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INTRODUCTORY.

The marvellous advance which has been made during the last half century in almost every department of science, manufactures and trade, together with the increased complication of mercantile transactions, has been attended by an enormous expansion of jurisprudence. The multiplication of railways, telegraphs, banks, insurance companies and corporations of every kind, giving rise to numberless questions of extreme intricacy and novelty, has led to an immense increase of legal work, and called for a greater number of persons to do that work. What can be more remarkable than the sudden leap which the English bar has made within the memory of many now living? The English Law List for 1817 shows that there were then but twenty-nine King's Counsel. Last year there were one hundred and nineteen. In 1817 the number of barristers was about seven hundred. Now it is six thousand! In the United States the increase has been equally marvellous; and in Canada, as we all know, it has not been small. The multiplication of judicial decisions is positively startling. The lawyer who would keep abreast with his profession at the present time needs all the aids within his reach. Besides the reports and digests, journals of a purely legal character, or nearly so, have been established in almost all the great cities of England and the United States, and have not only proved extremely useful and acceptable to the members of the bar, but have done much to keep up the interest which every one should feel in his profession. THE LEGAL NEWS is intended to fill a similar place in the literature of the Province of Quebec and Canada, and it is hoped will be a welcome visitor once a week to the office or the library of the professional man. No exertion will be spared to ensure accuracy and completeness within the limits assigned to the work, and if the journal finds sufficient support it is hoped that considerable improvements will be effected.

RENDERING JUDGMENTS.

It would be no easy matter to hit upon a model of a judgment and a style of delivering it that would satisfy everybody. Considerable divergence of opinion may be observed in the suggestions on this point so often heard in private conversation. And even if a model could be agreed upon that would give general satisfaction to the bar, Judges could hardly be expected in the discharge of their laborious duties to tie themselves down to a style foreign to their natural or acquired habit of expression. Whenever the matter of a discourse is of pre-eminent interest the manner is apt to be overlooked, or is left to regulate itself, and judgments, like arguments at the bar, seldom rank among specimens of polished eloquence.

Some latitude, then, must be allowed to the individuality of the Judge. Ease cannot be sacrificed to elegance nor accuracy to the desire to be brief. But there are certain points connected with the delivery of judgments on which all are agreed. These points we shall endeavor to indicate. The remarks which follow may be taken, therefore, not as the expression of individual opinion merely, but as the result of a comparison of the views of those who have some claim to be considered well-informed on the subject.

As the explanation of the facts of the case, if made at all, is obviously intended for the bar generally, and not for the counsel who are already familiar with the pleadings and evidence, it is desirable that it should be at once clear, concise and complete. That is to say, an intelligent auditor should not have much difficulty in grasping the points on which the parties are at issue. He should not be left to piece together scattered bits of information, or to follow the tedious verbiage of the pleadings before he can make out what is asked on one side and resisted on the other. It is desirable, in fact, that the Judge should begin, as often as practicable, with a brief statement of the nature of the demand and of the defence, so that the listener may not be left to grope in the dark for the point in dispute during the reading of lengthy extracts from depositions, affidavits, or correspondence.

In a Court of Appeal it is still more desirable that the issue should be plainly stated at the

beginning. We sometimes hear a case argued with considerable warmth and energy by some one member of the Court, and it is only from the exhibition of unusual warmth that we are led to surmise that the Judge is expressing and sustaining his individual opinion and not that of the majority of the Court. Then it may happen that he is followed by colleagues who manifest equal warmth on the opposite side. The case is fully argued by the members of the tribunal, and when the discussion is at an end the listener involuntarily turns to the bar who have been constituted, so to speak, judges of the disputation, and expects to hear from them the familiar words, "*Taken en délibéré.*"

Of course these displays are of comparatively rare occurrence, and no exception can be taken to the ordinary manner of many of the Judges. It may be inferred, too, that those who lapse into the fault adverted to are unconscious of the light in which they appear, because some of these gentlemen before their appointment to the bench were accustomed to condemn very strongly that very mode of delivery of which they themselves now furnish too many illustrations. It may be that the interest of the questions involved, and which have been the subject of earnest and prolonged consideration, betrays the speaker into a prolixity of which he is faintly conscious; or, perhaps the discussions which have going on in Chambers are adjourned to the bench and continued from the judgment seat.

As we remarked at the outset, it is vain to expect that judgments can be framed on one model; but it is at least possible to avoid the exhibition of that heat which sometimes glows in judicial deliverances. The Judge who differs from the majority is not required to convince his audience that he is right and that his colleagues are wrong in their view of the law or the facts of the case. Still less is he called upon to stigmatize as 'absurd,' 'contrary to common sense,' 'preposterous,' or 'inconceivable,' any opinion which is about to be adopted and sanctioned by the judgment of the Court. Such offences against decorum are apt to provoke reprisals, and always detract from the respect which is due to the bench.

The dissenting Judge would do well, probably, to express his opinion in writing. That has been the practice of several eminent jurists.

But at all events let him be content to state the reasons of his dissent in a lucid and orderly manner, and then perhaps he will not find it needful to add any further observations by way of reply or otherwise after the judgment of the majority has been pronounced. As to the latter, the delivery of it may usually be intrusted with advantage to a single Judge, unless the differences of opinion among the majority are so marked and important as to call for separate statements.

Much might be added on this subject. Many of our readers would no doubt find it easy to make additional suggestions of hardly less importance. We shall be glad to hear them. But if the few hints which are here put together were generally acted upon, we venture to think that the Judges, when laying the result of their deliberations before the bar, would have a less wearied and far more interested audience than sometimes falls to their lot.

APPEALS.

During the December Term of the Court of Queen's Bench, at Montreal, judgment was pronounced on thirty-five appeals in civil cases. The result was as follows:—

Confirmed unanimously.....	14
Confirmed, 1 Judge dissenting.....	3
Confirmed, 2 Judges dissenting.....	4
Reversed unanimously.....	6
Reversed, 1 Judge dissenting.....	2
Reversed, 2 Judges dissenting.....	6
Total.....	35

There was also a reserved case from the Crown side, in which the conviction was affirmed, one Judge dissenting. When we remember that these appeals present the most difficult and complicated questions arising in the great volume of business disposed of by the lower courts, we can hardly charge the Judges with lack of unanimity, seeing that they were all agreed in twenty out of thirty-six cases. The fact that judgment was confirmed unanimously in fourteen cases, equal to two-fifths of the whole number, seems to indicate a disposition on the part of some members of the bar to try the chances of an appeal in rather weak cases.

We propose, in the present and future issues of the LEGAL NEWS, to furnish a synopsis of these decisions, as well as of the judgments that

may be pronounced in future terms, and in the execution of this task, we shall at all times be glad of any memoranda (apart from the printed facts) with which we may be favored.

LAWYERS' SCRAP BOOKS.

A letter enclosing a subscription to the *LEGAL NEWS* suggests strongly one aspect in which a journal like this must give good value to its subscribers. Our correspondent writes: "As a very old and constant practitioner for upwards of thirty years, I have long felt the want of a publication something larger in its field than our ordinary law reports, and which though in some measure to be found in the broad columns of the *Gazette*, is not convenient to keep for my own use. For over twenty years I have kept, and for half the time have arranged alphabetically and in form for ready reference on all points involved in cases, all newspaper reports of law cases, as they appeared in the *Gazette*, and very often in argument I cite them, and they are received as 'authority,' in default of better."

A good many lawyers, like our correspondent, begin to make scrap-books of cuttings from newspapers, but very few have the perseverance to keep them up so long as he. The time and labor needed are too great. But what we wish to say is this. Looking at the *LEGAL NEWS* in its humblest light as a mere record of matters which it is desirable to keep by one for reference, it is evident that the first cost of the blank books used as scrap-books, to say nothing of the labor of indexing and arranging, would be more than the subscription to the *LEGAL NEWS*, besides the advantage of having one convenient and handsome volume, carefully indexed, instead of several unwieldy scrap albums.

REPORTS.

COURT OF QUEEN'S BENCH.—APPEAL SIDE.

Montreal, Dec. 14th, 1877.

Present:—Chief Justice DORION and Justices MONK, RAMSAY, TESSIER, and TASCHEREAU *ad hoc*.

Agents, Atty. Gen., (Plff. below) Appellant; and THE QUEEN INSURANCE Co., (Defts. below) Respondents.

Powers of Local Legislatures—Stamp duty on Insurance Policies—Quebec Statute, 39 Vict. c. 7.

Held, (affirming the judgment of the Superior Court, 21 L. C. J. 77) that the Quebec Statute, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should be paid by stamps affixed to the policies issued, is unconstitutional.

The Legislature of Quebec passed an Act, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should consist in the payment to the Crown for the use of the Province of a percentage on premiums, and the percentage was made payable by stamps affixed to the policies issued. The right to impose this tax being denied by the companies, the present action was instituted as a test case by the Attorney General of the Province on behalf of the Crown, charging the respondents with infraction of the Statute.

The respondents pleaded the unconstitutionality of the Statute, inasmuch as it levied an indirect tax upon insurance business, and thereby encroached upon the exclusive jurisdiction of the Parliament of Canada.

The Court below (Torrance, J.) maintained the plea, and the action was dismissed.

RAMSAY, J., differing from the majority, would be for reversing the judgment appealed from. The tax levied by requiring stamps to be placed on insurance policies, though not direct taxation within the meaning of Section 92 of the B. N. A. Act, par. 2, yet fell within par. 9 of the same Section, permitting local legislatures to issue licenses for the raising of revenue for Provincial purposes. The payment of the license fee by stamps was simply a mode of collection, and was the most equitable mode that could be adopted.

DORION, C. J., held that the charge imposed on licenses by the statute was clearly an indirect tax, and the attempt to put it in the form of a license was an evasion of the B. N. A. Act, from which the local legislature derives its powers. His Honor abstained from expressing any opinion upon the question, not raised here, whether the local legislature has not power to force insurance companies to take a license at a fixed sum.

Judgment confirmed.

Carter, Q. C., and Lacoste, Q. C., for Appellant.

Abbott, Q. C., Kerr, Q. C., and Doutre, Q. C., for Respondents.

Present:—Justices MONK, RAMSAY, TESSIER, CROSS, and TASCHEREAU *ad hoc*.

ALLAN, *et al.*, (Defts below) Appellants; and McLAGAN, (Pltff. below) Respondent.

Defendants sued jointly and severally—Death of one or more defendants does not suspend suit.

Held, that an action, *ex delicto*, against several persons jointly and severally, is not suspended as to the survivors by the suggestion of the death of one or more of the defendants. Such action may be brought against any one or more of the persons jointly and severally liable.

The respondent sued for damages sustained by falling through an open hatchway of the steamer *Anglo Saxon*, on which he was a passenger. The action was brought against the appellants as joint owners, the allegation being that the hatchway had negligently been left open, and that this negligence was the cause of the accident. The damages were estimated by a jury at \$12,500, and the verdict, which was maintained by the judgment of the Court below, was not seriously complained of. But the defendants appealed on various technical grounds, the objection chiefly insisted upon being that after the death of two of the defendants, the plaintiff had continued his action and obtained judgment against all.

TASCHEREAU, J. *ad hoc*, after pointing out that the defendants were jointly and severally liable, proceeded to remark: The death of one of the parties, says the Code, suspends the suit. But "one of the parties" means either the plaintiff or the defendant in the suit. Now, here and in all cases against joint and several defendants, though as a matter of procedure, there appears to be only one suit, strictly speaking, in law, there are as many suits as there are defendants; if one of the defendants dies, the suit between him and the plaintiff is suspended, because, according to the terms of the Code, one of the parties has died, but the other suits against the other defendants are not thereby interrupted.

It is an action *ex delicto*, upon which the defendants, if responsible at all, are so jointly and severally. The plaintiff could have singled out one only of the owners of the *Anglo Saxon* and might have instituted his action, if he had chosen, against this one alone. . . . The material point is, were the appellants, who have been condemned, such joint owners? Whether others were jointly owners with them,

or whether Symes was or was not a joint owner, has nothing to do with the issue between them and the plaintiff.

Judgment confirmed.

Ritchie & Borlase for Appellants.

Doutre & Co. for Respondents.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and TASCHEREAU *ad hoc*.

BEAUSOLEIL *es qual.*, (plff. below), Appellant; and CANADIAN MUTUAL FIRE INSURANCE CO. (defts. below), Respondents.

Fire Insurance—Failure to give notice of other insurances.

One Mazurette (represented by his assignee, the appellant) effected an insurance on his stock with the respondents, and in the policy there was a condition that insurances elsewhere would make the policy void unless the company received notice of such subsequent insurances. Mazurette failed by some inadvertence to give notice of an insurance effected subsequently in the Commercial Union Insurance Co. *Held*, that he could not recover on the policy.

Jett, Beique & Choquet for Appellant.

Lunn & Davidson for Respondent.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY and TESSIER.

CALDWELL (plff. below) Appellant; and MACFARLANE (deft. below), Respondent.

Insolvency—Buying goods on credit with intent to defraud.

1. An action was brought against an insolvent, under Section 136 of the Insolvent Act of 1875, alleging twenty-six different purchases of goods with intent to defraud, but concluding with a single prayer for the imprisonment of the defendant. *Held*, (reversing the judgment of the Superior Court) that it was not necessary to charge each purchase as a distinct offence.

2. Where the Court finds the evidence insufficient to justify an order for imprisonment, the plaintiff in such proceeding is nevertheless entitled to judgment for the debt if proved.

The action was brought, under section 136 of the Insolvent Act of 1875, by Caldwell, as representing the previously existing partnership of Caldwell & Watchorn, alleging that Macfarlane had purchased goods on credit from the firm on twenty-six occasions during a specified period, and that when he made these purchases he knew himself to be insolvent, and bought with intent to defraud.

The respondent pleaded by demurrer that there were twenty-six different purchases alleged, each of which constituted a separate offence, while there was only one prayer, and that the court could not adjudge imprisonment.

under the circumstances. Upon this demurrer the action was dismissed in the court below.

DORION, C. J., said the Court of Appeal was unanimously of opinion that the demurrer could not be maintained. The proceeding invoked was a civil remedy which the law left open to the creditor, and the imprisonment was ordered, not for an absolute term, but only in case the debt and costs were not sooner paid. It was not necessary, therefore, to charge each offence separately. The court had to reverse the judgment. But on looking into the merits, it appeared that although Macfarlane had purchased goods from the appellant during the period in question to the amount of about \$30,000, he had actually during this interval considerably reduced his indebtedness to the appellant, having made payments in all amounting to about \$58,000. The Court considered that this fact rebutted any presumption of fraudulent intent which might arise from the state of Macfarlane's affairs. The prayer for the imprisonment of the defendant, therefore, could not be granted. But the appellant was entitled to judgment for his debt. Each party to pay his own costs in appeal.

Judgment reformed.

Abbott, Tait, Wotherspoon, & Abbott for Appellant.

Kerr & Carter for Respondent.

Present:—Chief Justice DORION, and Justices RAMBAY, TESSIER and CROSS.

PERIAM (def't. below), Appellant; and DOMPIERRE (plff. below), Respondent.

Damages—Contributory negligence.

The plaintiff, a carter, went to load wood at a wharf, in the port of Montreal, where a steamer was in the act of mooring, and a cable having snapped the plaintiff was seriously injured by the recoil. There was evidence that the plaintiff was aware of the danger. *Held*, that there was contributory negligence on his part, and he could not recover damages.

The respondent, Dompierre, a carter, brought an action of damages against Periam, the master of a steamer. The circumstances were these: Dompierre was employed in carting wood from a wharf in the port of Montreal. The steamer "Lufra," of which Periam was master, was in the act of mooring; when a cable, attached to an iron ring on the wharf, which was being taken up by the captain to bring the steamer

in, suddenly tightened and gave way, and the rebound of the rope seriously injured the respondent. It appeared from the evidence that Dompierre was aware of the possibility of such an accident, and had previously informed some other carters of the danger.

The Court below awarded the respondent \$100 damages.

TESSIER, J., differing from the majority, held that the judgment was correct, the accident, in his opinion, being the result of negligence on the part of the master.

CROSS, J., for the majority of the Court, remarked that it was not as if Dompierre had been a passenger on board the steamer, and thus in the charge and keeping of the master. If the wharf was free to Dompierre to cart away wood, it was certainly equally free to Periam to moor his steamer. This was a primary purpose of the wharf, and it could not be pretended that the "Lufra" should interrupt the customary operation of mooring to suit the convenience of Dompierre. Why should the master put men on the wharf to warn Dompierre of what he well knew? He himself had declared that the cable was dangerous, and yet he exposed himself to be injured by it. The proximate cause of the accident was his own failure to exercise proper caution. The action should have been dismissed.

Judgment reversed.

Kerr & Carter for Appellant.

H. C. St. Pierre for Respondent.

CURRENT EVENTS.

CANADA.

Judges Knighted.—The Bench of Canada have had but a meagre share of imperial distinctions. Many gentlemen worthy of such favors have been passed over. Why, for instance, should a brilliant lawyer like the late Chief Justice Draper, never have received the honor of Knighthood? A step towards remedying the apparent neglect of Canadian Judges has been taken, and it is pleasing to see that the honors have fallen to gentlemen so eminently deserving as Sir W. B. Richards, Chief Justice of the Supreme Court of Canada, and Sir A. A. Dorion, Chief Justice

of the Court of Queen's Bench in the Province of Quebec. This is a good beginning. Perhaps a further step might have been taken with advantage in the same direction.

ONTARIO.

John Walpole Willis.—The death of this gentleman in England, at the advanced age of 84, recalls some facts of early legal history in Ontario. Mr. Willis was appointed a Judge of the King's Bench in Upper Canada in 1827—just half a century ago. He was called to the bar in England in 1816, and besides holding judicial office in Canada, was also for some time a Judge of the Supreme Courts of British Guiana and New South Wales. The London *Law Times*, in its obituary notice, says:—

"Mr. Willis' career as a colonial Judge was signalised by two remarkable episodes. Whilst acting as Judge of the supreme court of Upper Canada; (King's Bench) a judgment was given by him to the effect that certain political prisoners were illegally detained in custody. In consequence of this the Governor of Canada, (Sir John Colborne) peremptorily dismissed Mr. Willis from the bench. The Judge appealed to the King in Council, and it was decided that his judgment was right, and he was reinstated in his office. Afterwards, Mr. Willis was sent to the West Indies to adjust compensation claims under the Slavery Emancipations Act, and held other judicial offices. When Victoria was first erected into a separate government, Mr. Willis was appointed Judge of the District, but in 1843, in consequence of a judgment he gave against the legality of the proceedings of the Colonial Government with regard to waste lands, Sir George Gibbs, the Governor of New South Wales, dismissed Mr. Willis from his post of Judge of the Supreme Court. The colonists generally sided with the Judge, who appealed again to the Privy Council, and again, after a protracted litigation, with success. Sir G. Gibbs was ordered to pay damages and costs."

Chief Justice Moss.—This gentleman, like Mr. Theolger, the new Lord Justice of Appeal in England, has attained to high judicial office at an unusually early age. He has been appointed President of the Court of Appeal in the room of the late Chief Justice Draper. The appointment, however, has given satisfaction, and it must be said that where the necessary knowledge and experience are not wanting, youth can hardly be deemed a drawback at the present day, when the duties of a Judge make no slight demand upon the physical as well as the mental energy of the individual.

QUEBEC.

THE BUSINESS BEFORE THE COURT OF QUEEN'S BENCH, APPEAL SIDE.—This Court has been endeavouring for several years to clear the roll of cases inscribed for hearing at Montreal, but so far unsuccessfully. In the course of the December term at Montreal an application was made by Mr. Kerr, Q. C., the *Bâtonnier* of the Montreal Section, for an extra term. The Court took the matter into consideration, though apparently of opinion that it was not possible to hold an extra term and at the same time dispose of the cases already argued. On the last day of the term (Dec. 27th) the Chief Justice, at the opening of the Court, addressing Mr. Kerr, remarked:—

"You have suggested, Mr. Kerr, that an extra term should be held, but we think that would not advance us much. We have three cases before us in which the factums comprise 350 pages. We have also 21 cases in Quebec with very heavy factums. So that if we give an extra term it would be impossible to render judgment in the cases already heard. After giving the matter the best consideration, and with every desire to meet the wishes of the Bar, understanding as we do the grievance of having a long list of cases unheard, we are unable to hold an extra term and at the same time advance the business before the Court. I may mention in this connection that the Court about a year ago passed a rule which enables lawyers to agree upon a case, and if that rule were acted upon it would greatly facilitate the Bar and the Court. There was a case submitted yesterday with a factum of 110 pages. The amount in dispute is only \$150, but the printing alone at two dollars a page would be \$220, and I was told that the greater part of it was objections at *enquête* which had no meaning. Why should the Court be compelled to read through all this? Let lawyers make a statement of the points on which they agree. Let it be sent up as a reserved case is sent up, with such part of the evidence as is material. In a case last term we were ready to give judgment, but there was one fact to be verified, and I was an hour or more looking over the evidence to find the statement referred to in the factum, and not being able to find it, the judgment had to be held over. In a case about wages there is a factum of 143 pages on

one side and about 100 on the other. In another case concerning the signature to a promissory note, there are 110 pages of evidence. I think the lawyers and the Court might be greatly facilitated by an agreement to send up only such portions of the evidence as are material. This however is merely a suggestion. But after full consideration we have come to the conclusion that the interests of suitors would not be advanced by an extra term under the circumstances." The Court, however, has been adjourned to January 29 for judgments.

The majority of the Judges seem to be of opinion that the arrears might be disposed of if the system of terms were changed, and four Judges were to sit from day to day in Montreal, except when otherwise engaged, to hear the Montreal cases.

BRITISH COLUMBIA.

TRAVELLING ON CIRCUIT UNDER DIFFICULTIES.—British Columbia possesses a Judge of great energy in Mr. Justice Crease. While riding over a trail lately, on his way to hold a court, his horse stumbled and fell, and the Judge being thrown forward on the pommel of the saddle, received serious injuries. But, notwithstanding the intense suffering resulting from the accident, the Judge, according to a local journal, proceeded to hold court while lying on a stretcher, and, although physically helpless, went through the business in a manner that showed him in no respect wanting in his wonted mental vigor. "In coming out from the mines," the narrative proceeds, "Judge Crease was packed over the trail between Dease Lake and Telegraph Creek, a distance of nearly 100 miles, on a stretcher borne by eight Indians. The situation was a trying one for the honorable Judge. No one who has not been over the trail over which he was carried will be able to form an adequate idea of the nature of the undertaking. The descent to and ascent from the two forks of the Stickeen River was, under the circumstances, simply terrific. On more than one occasion the stretcher was necessarily in a perpendicular position, with the Judge's head down hill, and had it not been that he was firmly strapped to the stretcher with strong leather bands, it is obvious that the Judge and his couch would oftentimes on the journey

have parted company in a rather unceremonious manner."

GREAT BRITAIN.

AGENTS' COMMISSIONS.—The Master of the Rolls has given an important decision in the case of *Williamson v. Barbour*, with reference to commissions charged by agents. The suit in question was brought by a Calcutta firm, Williamson Brothers & Co., against a well-known Manchester commission firm, Robert Barbour and Brother, to open the accounts which had existed between the two firms during a long term of years, with the object of obtaining the repayment of alleged overcharges made by the Barbours. The transactions between the parties, which dated as far back as 1850, were of considerable magnitude. It appears that the Manchester commission firm acted as the agents in England for the purchase and forwarding to India of what are termed Manchester goods, consisting of white shirtings and gray shirtings. The practice, as we learn from the *Times'* report, is to buy the gray shirtings, and submit them to various processes, such as bleaching, dyeing, glazing, swissing, and thus convert them into white shirtings. The goods are then packed, sometimes in bales, sometimes in tins and boxes, and shipped to their destination. The accusation against the Barbours was that they made a profit on the buying of the goods, and further on the bleaching, both by discounts from the bleachers, for which they did not account to their principals, and by an extra charge on the gross amount paid the bleachers. Their illicit profits also extended to the tickets supplied, on the sums paid for marking the goods, the packing and packing cases. Another serious branch of the accusation was that these men charged premiums of insurance on goods which they really did not insure at all, and interest on sums which they did not disburse until some time after the date from which interest was charged. The whole amount of alleged overcharges was about half a million dollars.

The defence to these charges, as to the substance of which there seems to have been no dispute, was that the agency ceased with the purchase, and from that moment the commission firm acted as principals and were justified in making all they could out of their customers

in India. The defendants also urged that the charges made were usual on the part of those engaged in similar business, and an attempt was made to support this pretension by the examination of other commission merchants whose statements tended to show something of the kind alleged, but not an established usage that would justify the Court in sustaining the defendants' plea. The case was evidently felt to be of immense importance, for able counsel from the Common Law bar were retained for the defence, including the Attorney-General and Mr. Benjamin. Five days were spent in hearing the case, and the judgment pronounced by the Master of the Rolls occupied three hours in delivery. The result of this elaborate examination was that the accounts were ordered to be opened for investigation of the long series of charges. The Judge remarked that accounts in such circumstances were always opened more readily when the persons stood in a fiduciary relationship to each other, and the Court would re-open an account as between a principal and his agent when a single instance of fraudulent overcharge could be shown. The question at this time was not to ascertain the exact state of the account, but to decide whether the Calcutta firm had made out a sufficient case of fraudulent overcharges to justify the Court in re-opening the account. On this point his Lordship was very clear. In his opinion the grounds that had been proved were fourfold more than enough to open the accounts. The defendants, in fact, did not dispute that an extra charge had been made in almost every item. After enumerating the various heads of complaint, his Lordship said that as to the insurances there was no dispute that the defendants had been directed to insure and had charged the insurance, although they had not actually done so for the amounts represented. They had also charged for premiums and for policies which were never paid. As to the discounts, too, the matter was practically admitted. The defences to the charges which were not admitted were somewhat curious. The defendants denied their agency except for the purpose of buying, as an attempt had been made to show that as soon as the defendants had bought the relation of principal and agent ceased. As to that the Judge was of opinion that they bought and forwarded as agents, but

that they were principals for the purpose of packing, and such like charges, and were entitled to make a reasonable charge for so doing, and which he could allow them when the matter came into Chambers. That circumstance, however, did not alter the main relationship between the parties, which was that of principal and agent, any more than if they had employed a packer to do the work.

An appeal is intimated, but the decision of the Master of the Rolls is so obviously founded on justice and common sense that there is no reason to believe that it will be disturbed. The suit has been watched with much interest in England, and the decision has caused a flutter in some circles. The *Times* hints pretty plainly that a great many other agents of various kinds are in the same boat with the Barbour Brothers. "The vigorous language of the Master of the Rolls," it remarks, "will carry consternation into some highly respectable counting-houses, and will excite vague terrors in the breast of more than one merchant prince. When a man agrees to act as the agent of another for a specified remuneration, and, as agent, buys goods for his principal, and when he puts down in his invoice a higher price than he actually paid, are we not to call his conduct fraudulent? What can be urged to take the charges for insurances which were never effected out of the category of fraud? What is to be said in defence of the profits made by the agents upon discounting their principals' bills, the charges for interest that never accrued, the suppression of the trade discounts allowed which ought to have gone to the credit of the principal? If agents are to exact profits in this way, it must be with full notice to their principals, and not in reliance on the latter's possible acquaintance with a disputed, or, at best, an ill-defined custom. But it may be safely said that no commission agency in the world would venture to propose to do business on terms including the right to charge for insurances that were never effected, and for interest on money that had never accrued."

THE BENCH AND UNIVERSITY HONORS.—The *Solicitors Journal* says:—

"Some of our contemporaries who attacked the recent judicial appointment on the ground of the learned Judge's want of University distinction were probably unaware that only a

small proportion of the existing judicial staff are graduates in high honors. Including eight Law Lords and the four paid members of the Judicial Committee of the Privy Council, the total number of Judges may be taken as forty. Out of this number seven are graduates of Oxford and eleven are graduates of Cambridge. Of the seven graduates of Oxford, Lord Selborne obtained a first class in classics, Lord Justice Cotton a second-class in classics and a first class in mathematics, and Sir Robert Phillimore a second class in classics; while Lord Coleridge, Lord Justice Thesiger, and Justices Grove and Lopes were passmen. The eleven Cambridge Judges exhibit a larger proportion of classmen than those who have been educated at the sister University. Lords Hatherly and Blackburn and Lord Justice Baggallay were wranglers, the Lord Chief Justice of England was in the first class of the Civil Law Tripos, Mr. Justice Denman was Senior Classic, while Baron Cleasby was both a wrangler and first class man in classics. Lord Justice Brett and Sir James Colville were Senior Optimes, Vice-Chancellor Malins was a Junior Optime, and Lord Penzance and Sir Robert Collier took no honours. The University of London is represented by the Master of the Rolls and Mr. Justice Fry, both of whom obtained high honours, and the Lord Chancellor's career at Trinity College, Dublin, was also highly distinguished. Baron Huddleston was educated at the last-named University. Lord Gordon and Lord Justice James were educated at Scottish Universities, and Sir James Hannen at Heidelberg, while the remaining fifteen Judges do not appear to have graduated at any University."

IRELAND.

LAW REPORTING.—Judge Christian, Lord Justice of Appeal, has been assailing for some time past the reports published under the authority of the Council of Law Reporting in Ireland. Either the Judge is very eccentric, or the reports are very carelessly done. In a late issue of the *Times* the following appears in its Dublin correspondence:—

"In the Court of Chancery Appeal to-day, Judge Christian, Lord Justice of Appeal, in expressing his concurrence in the judgment delivered by the Lord Chancellor affirming a decision of the Vice-Chancellor, declined to state his reasons for so doing, being assured that if he did so a mangled version of it would in a week or a fortnight be sold to the solicitors on either side, and would in due course be laid before counsel in London for them to advise as to the hopefulness or the hopelessness of an appeal to the House of Lords. He appealed to the Council of Law Reporting, as gentlemen, to state in their next publication that the reports

given in their publication of the case of *'Lewis and Coote v. Gordon'* had been disowned, disclaimed and exposed by the calumniated Judge. That reparation he demanded of them in the interests of justice and fair play, and he could not bring himself to believe that it would be refused. He desired to make a few observations with reference, not the strictures of the newspapers, or one or two of them, on himself, but with regard to the temperate and weighty strictures which he heard had been passed upon him by instructed, competent, impartial, nay, even in some instances friendly, critics. By some such it seemed to have been thought that he had spoken too strongly; that he had made too much ado about individuals, that, in fact, he had been breaking flies upon a wheel. With all deference, he thought that these gentlemen had failed to realize the true state of the case. The publication of that libel in *'Lewis vs. Lewis'* was an aspersion upon him of the most malicious kind that could be made upon any judge. Was he to pass that over in silence? Had he done so after what had occurred in July, it would have been loudly proclaimed as an admission of the accuracy of the report. If a policeman from the 'Hall,' or a coal-porter off the quay, had been brought in and placed in the reporters' box, he could hardly have produced a thing of more entire inanity—if, indeed, it was not wilful caricature. But it was said, 'You are assailing the reporters.' As well might the highwayman complain that he was assaulted by the man who resisted him. He again appealed to the Council of Law Reporting to take prompt measures for expunging from their publication the slanderous trash they had appended to his name, which constituted a series of defamatory libels on the Court of Appeal in Chancery in Ireland."

RECENT ENGLISH DECISIONS.

Company.—1. Nine persons signed the memorandum of association of a new company. At a preliminary meeting, attended by four of the signers, it was voted that three others should be allotted no shares, and the deposit made by them should be repaid; which was done, and the three had nothing more to do with the company. The directors, under the articles of association, had power to issue and dispose of shares, as they thought fit, but had no power to accept surrenders of shares. *Held*, on the winding up of the company, that the three were contributors.—*In re London and Provincial Consolidated Coal Company*, 5 Ch. D. 525.

2. The proprietors of a lease and concession of the island of Alto Vela from the Republic of

Santo Domingo, for the working of guano and other deposits on the island, became liable to forfeit the same by failure to perform some of the conditions thereof. They then went to work to get up a company, to the trustees of which they sold the property; and the trustees made it over to the company. For their part in the transaction they received £15,000 "commission" in shares. The company, through the trustees, employed the same counsel employed by the sellers and promoters; and they passed the title to the property as good. The directors, who were chiefly composed of the promoters, speculated in the shares. One of them, the defendant H., got up a pretended sale of certain patent rights belonging to the company, for a large sum, to a person who turned out to be a tool of H.; and all the money paid down by him was furnished him by H. Meanwhile the Dominican Government proposed to take advantage of the forfeiture. The condition of things came out. The shares fell from £60 to £3, and the deluded stockholders brought suit against the original proprietors of the property, the trustees, promoters, directors and counsel. *Held*, that the proprietors must repay the whole purchase money, the trustees their "commission," (called by the court a bribe); the counsel and directors, who were not proprietors and promoters, their proportion of the costs of suit.—*Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394.

Copyright.—If a dramatic piece has been first represented in a foreign country, the author has no exclusive right over the piece in England. Representation is publication within 7 Vict. c. 12, § 19.—*Bowcraill v. Chatterton*, 5 Ch. D. 247.

Evidence.—Indictment for obtaining money under false pretences. The prisoner was time-keeper, and C. was paying clerk to a colliery company. Every fortnight the prisoner gave C. a list of the days worked by each man, and C. entered them in a time-book, together with the amount due each one. On pay-day, the prisoner had to read from the time-book the number of days so entered, and C. paid them off. While the prisoner read, C. looked on the book also. *Held*, that C. might refresh his memory as to the sums paid by him to the workmen, by referring to the entries in the time-book. *The Queen v. Langton*, 2 Q. B. 296.

Factor.—H., a commission merchant and tobacco dealer, sold, through his agent K., to the plaintiff, a lot of tobacco lying in bond at the dock. The tobacco, according to the usage practised between the parties, remained at the dock uncleared in the name of H.; but the transaction was entered in H.'s books as a sale; and Dec. 3rd, 1875, an invoice of sale by H. to the plaintiff was sent to the latter, and Dec. 31st he paid for the tobacco in full. The usage had been in such cases for the plaintiff to receive the tobacco in instalments, as he wished it to manufacture, in which case he would send dock dues and charges for the portion he wanted, and that portion would be discharged and forwarded by H.; but in this case none of the lot had been sent, and March 9th, 1876, H. absconded, and March 15th was adjudged bankrupt. Meantime, Jan. 26th, 1876, he had pledged the tobacco to the defendants and given them the dock warrants, and transferred the tobacco into their name. He represented it to be his property, and they had no knowledge that the plaintiff claimed it. The court had power to draw inferences of fact. *Held*, that the plaintiff was entitled to the tobacco; and that H. had no authority to sell or pledge the tobacco while lying in the dock in his name, but only to clear and forward it to the plaintiff.—*Johnson v. The Crédit Lyonnais*, 2 C. P. D. 224.

False Pretences.—Indictment for obtaining money under false pretences. Prisoner was a pedler, and induced a woman to buy some packages, which he called good tea, but which turned out to be three-quarters foreign and deleterious substances. The jury found that he knew the character of the stuff, and that he falsely pretended it was good, with intent to defraud. *Held*, that the conviction must stand.—*The Queen v. Foster*, 2 Q. B. D. 301.

Freight.—Charter-party by the defendants to convey a cargo of railway iron from England to Toganrog, Sea of Azof, or "so near thereto as the ship could safely get," consigned to a Russian railway company. The ship arrived, Dec. 17th, at Kertch, a port 300 miles by sea and 700 by land from Toganrog, where the captain, the plaintiff, found the sea blocked up with ice, and unnavigable till April. Against the orders of the charterers, who notified him

that they would hold him responsible, he proceeded to unload the cargo; and, there being nobody to receive it, he put it in charge of the Custom-house authorities there. The consignees claimed it; and, on their producing the bill of lading and charter-party, it was delivered to them, against the captain's claim that it should be retained for the freight. A receipt was given to the effect that the cargo was received "on the power of the charter-party and the bill of lading." *Held*, affirming the judgment of the Queen's Bench Division, that the Captain was entitled to no freight, not even *pro rata*. *Metcalf v. The Britannia Iron Works Co.*, 2 Q. B. D. 423.

General Average.—A captain burnt some spars and a part of the cargo, to keep the donkey engine running to pump the ship in bad weather, and thus saved her. The ship sailed properly equipped with coals; but they ran short, owing to unexpected bad weather. *Held*, a case for general average.—*Robinson v. I'rice*, 2 Q. B. D. 295.

Husband and Wife.—A wife cannot commit larceny from her husband, no matter whether she has been guilty of adultery or not. *The Queen v. Kenny*, 2 Q. B. D. 307.

RECENT UNITED STATES DECISIONS.

Agent.—A broker is entitled to a commission for effecting a sale of land, if he has procured a person to enter into a binding agreement to purchase it, though the agreement be not carried out.—*Love v. Miller*, 53 Ind. 294.

Attorney.—1. An attorney who published advertisements of divorces obtained "without publicity; residence unnecessary," giving his address at a particular post office box, without his name, was stricken from the rolls.—*People v. Goodrich*, 79 Ill. 148.

2. An attorney-at-law cannot delegate his authority; and therefore payment of a debt entrusted to him for collection, to a person authorized by him to receive it, does not discharge the debtor.—*Dickson v. Wright*, 52 Miss. 585.

Bankruptcy.—Debts due from a factor to his principal are debts "created while acting in a fiduciary capacity," within the meaning of the Bankrupt Act, and are not barred by a discharge in bankruptcy.—*Banning v. Bleakley*, 27 Louisiana Annual 257.

Bills and Notes.—If a promissory note bearing interest payable annually be endorsed before maturity, but after an instalment of interest is due and unpaid, the endorsee takes it subject to all equities between the original parties.—*Hart v. Stickney*, 41 Wis. 630.

Burglary.—The prisoner entered, without breaking, a dwelling-house by night, with intent to commit felony, and broke out in making his escape. *Held*, that he was guilty of burglary, by force of the English Stat. 12 Anne c. 7, which, if not merely declaratory of the common law previously existing, is itself a part of the common law of the State.—*State v. Ward*, 43 Conn. 489.

Checks.—Checks deposited with a bank, and credited in the depositor's pass-book, are taken, in the absence of special agreement, for collection, and not as cash; and may be afterwards returned and the credit annulled if there are no funds to meet them; and this, whether drawn on the same bank or another.—*National Gold Bank v. McDonald*, 51 Cal. 64.

Conspiracy.—A conspiracy by A and B to injure C, in an enterprise in which they are all jointly engaged, is not criminal, if the whole enterprise is unlawful; because conspiracy is not criminal, unless against an innocent person. And, therefore, where two conspired to defraud a third by falsely pretending that parcels sold by them to him contained counterfeit money; whereas, in truth, such parcels contained only sawdust,—*held*, that the conspiracy was not indictable.—*State v. Crowley*, 41 Wis. 271.

Contempt.—1. A sentence of imprisonment for contempt committed in the presence of the Court, is valid though pronounced in the absence of the offender.—*Middlebrook v. The State*, 43 Conn. 257.

2. A libel on a grand jury, as to their past action, not calculated to obstruct the future

performance of their duty, *held* not punishable as a contempt of court.

Corporation.—1. A member of an incorporated Board of Trade, expelled therefrom for violation of its by-laws, was held to have no remedy in the courts to be restored to membership, either by bill in equity or by mandamus.—*Fisher v. Board of Trade*, 80 Ill. 85.

2. If a contract of subscription be made to stock in a corporation, and certificates in the usual form issued to the subscriber, a condition reserving the right to the subscriber to cancel his contract will be held void as against other subscribers, though expressed on the face of the contract.—*Melvin v. Lamar Ins. Co.*, 80 Ill. 446.

Damages.—1. In an action of tort for personal injuries, the declaration averred that the plaintiff was by such injuries prevented from attending to his ordinary business. *Held*, that he could not, without more particular allegations, recover special damages on the ground of loss of employment in a trade requiring special skill and training.—*Taylor v. Monroe*, 43 Conn. 36.

2. A buyer of seed, who knows before sowing it that it is of inferior quality to that which the seller agreed to furnish, cannot recover of the seller damages for the diminished value of the crop.—*Oliver v. Hawley*, 5 Neb. 439.

Evidence.—Evidence as to the religious belief of a person does not affect the admissibility, but only the weight, of his dying declarations.—*People v. Chin Mook Sow*, 51 Cal. 597.

Fraudulent Conveyance.—The grantee in a conveyance alleged to be fraudulent cannot, in defence of a suit brought by a creditor to set it aside, show by parole a consideration different from that expressed in the conveyance.—*Galbreath v. Cook*, 30 Ark. 417.

Gaming.—In an indictment for playing cards on Sunday, the particular game played need not be averred; but if averred, it must be proved as laid.—*State v. Anderson*, 30 Ark. 131.

Indictment.—Indictment for breaking into the house and stealing the goods of A. The evidence was that the goods stolen were household furniture, the separate property of A's wife, and in the common use of the family.

Held, no variance.—*State v. Wincroft*, 76 N. C. 38.

Insurance.—1. A building was insured by policy conditioned to be void if the building should fall. The wall of part of the building fell, leaving more than three-fourths standing. *Held*, that the policy was not avoided.—*Breuner v. Ins. Co.*, 51 Cal. 101.

2. Insurance was effected on a phaeton contained in a barn, particularly described. *Held*, that the phaeton while left at a carriage-shop for repairs was covered by the policy.—*McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349.

3. A son has not necessarily, as such, an insurable interest in the life of his father.—*Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35.

Partnership.—A agreed to advance money to B from time to time, up to a certain amount, to enable B to carry on business; and B agreed to pay interest to A on the average balance advanced, and also half the profits, after deducting a fixed sum for expenses; but A was not to bear any losses. *Held*, that A and B were not partners as to third persons.—*Smith v. Knight*, 71 Ill. 148.

Seduction.—In an action for seduction of the plaintiff's daughter and servant, evidence that the defendant, after the seduction, procured an abortion to be made, is admissible to aggravate damages, at least if such matter is laid in the declaration; and evidence of an offer of marriage by the defendant after action brought is not admissible in mitigation.—*White v. Murland*, 71 Ill. 250.

Closely worked professional men often die literally in harness. Doctors have died in their carriages while making their round of visits; clergymen have died in their pulpits, and judges have died on the bench. The *Atlanta Constitution* relates a recent case of the last mentioned mode of taking off. The Superior Court was in session in Knoxville, Judge Hill presiding. A criminal trial had just been concluded, and the jury had returned a verdict of guilty. They neglected to give the value of the goods stolen, and Judge Hill told them that they had better retire and supply this part of the verdict. They went out, and soon afterwards an attorney looked up and saw Judge Hill's head thrown back on his chair, a deathly pallor overspreading his countenance. Friends rushed to him, but, with an easy gasp, his spirit passed away, and he sat dead on the bench.

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APPEALS FROM THE SUPREME COURT.

The Judicial Committee of Her Majesty's Privy Council have had under consideration the clause of the Supreme Court Act of Canada, taking away the right of appeal from any judgment or order of the Supreme Court. The question came up in a somewhat memorable case—an action brought by Mr. James Johnston of Montreal against the Minister and Trustees of St. Andrew's Church, in the same place. Mr. Johnston was lessee of a pew in St. Andrew's Church. Before the termination of the year ending 31st December, 1872, he received notice from the trustees that they declined to re-let the pew to him for the year commencing 1st January, 1873. Mr. Johnston complained that this notice was not legal, and that not having received a sufficient legal notice he became the legal lessee of the pew for the ensuing year; but that the trustees had refused to let him have possession, and had removed his hassocks from the pew and allotted it for the use of strangers. For these reasons Mr. Johnston claimed \$10,000 damages.

By their pleas the trustees averred that Mr. Johnston had ceased to be lessee of the pew on the 31st December, 1872, and that they had a right to refuse to lease it to him again after that date.

The Superior Court (Johnson, J. presiding) dismissed the action. (18 L. C. Jurist, 113.) The Judge held that the St. Andrew's Church being a voluntary organization, the civil courts could not interfere with the determination of the majority unless some civil right was assailed. In this instance the Judge considered that there was no such interference, and that the minister and trustees had a right to refuse to renew the lease of the pew on the expiration of the term for which it was leased.

There was an appeal by Mr. Johnston to the Court of Queen's Bench, Appeal side, and there the judgment of the Superior Court was sustained by a majority of the Judges, Chief Justice Dorion and Mr. Justice Ramsay dissenting.

The case then went to the Supreme Court of Canada, and by the judgment of this tribunal, rendered 28th June, 1877, the decision of the two lower Courts was unanimously overruled, the pretensions of Mr. Johnston were sustained, and the trustees were condemned to pay \$300 damages, with the costs of all the Courts. This judgment was based upon the proved usage of the Church, that a member once the lessee of a pew can continue to hold it by paying the usual rent and remaining a member of the Church, unless he is guilty of immoral behavior, and in that case he could only be deprived of his pew by the Kirk Session.

The case was in this position when the defendants in the suit sought to obtain an appeal to Her Majesty. The 47th Section of the Supreme Court Act, 38 Vict., c. 11, takes away the right of appeal in these words: "The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, *saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.*" Their Lordships of the Judicial Committee had, therefore, to determine whether a case had been made out for the exercise of the special prerogative of Her Majesty. On this point the Lord Chancellor expressed himself as follows:

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised to do, is left untouched and preserved by this section. Therefore their Lordships would have no hesitation in a proper case in advising Her Majesty to allow an appeal upon a judgment of this Court. But the question remains, assuming that there is the power to allow an appeal, is this a case in which the special prerogative of Her Majesty should be exercised? Upon that point their Lordships have been unable to discover any adequate grounds for the special exercise of the prerogative in this case. With regard to the particular injury arising as between the trustees on one side and the plaintiff in the action on the other, that of course is

the amount of damage which the trustees have been ordered to pay, the sum of \$300, far short of the appealable value which has been defined in Canadian cases, and therefore if the particular value alone is looked to, there is not that amount of injury which should justify any special interposition of the prerogative.

"Then is there any general principle affecting a number of other cases established by the decision which should lead their Lordships to overlook the small amount of damage in the particular case? As I have already pointed out, the issue between the parties appears to have been simply an issue upon the legal construction and effect of a particular contract for the occupation of the pew in question. So far as the declaration and the pleas are concerned, the question apparently raised between the parties was, both of them admitting that the tenure of the pew might properly be styled a lease, whether a pewholder was entitled, by reason of the particular clause in the Civil Code of Canada, to three months to quit, by reason of it having been a verbal lease. It is sufficient with regard to a contest of that kind to say that the decision of the Court below may either have been right or wrong. Their Lordships express no opinion whatever upon that point, but whether right or wrong, it is not a decision which can have any bearing, or which can occasion any inconvenience with respect to a large number of other cases. If there is any want of perspicuity in the terms under which the pews in this church at present are let, if there be any words in the by-laws of the trustees, as to the letting of the pews, which have caused a difference of opinion between the Judges of the Courts, all that can be most easily remedied before any other annual letting of the pews, by an alteration in their wording; and it would appear to their Lordships to be entirely foreign from the principles which should guide them when advising Her Majesty as to when an appeal should be allowed, to advise that an appeal should be allowed for the purpose of testing the accuracy of construction put upon a particular document which is at the will of the party who asks for the exercise of the prerogative, in allowing the appeal.

Their Lordships, therefore, either from the magnitude of the particular case, or from the

effect which this decision may have upon the number of other cases, think that this is a case in which they should advise Her Majesty not to assent to the prayer of this petition, but to dismiss it."

We are disposed to concur fully in the views expressed by the Judicial Committee. As a general rule, there can be no doubt that the multiplication of intermediate Courts of Appeal is a serious evil. The more the ladder of litigation is lengthened out, the greater will be the diffidence of honest men to go into Court either for the assertion or the defence of their just rights. They feel that no matter how good their cause may be, they are at the mercy of an obstinate antagonist with a long purse, who can inflict an amount of damage or interpose a delay which may be ruinous. If the Supreme Court, therefore, were to constitute simply an additional stage through which every keenly contested suit must be dragged, such a tribunal would present itself as an intolerable evil. There may be a question whether a party who has been taken to the Supreme Court by his opponent, and who has had the judgment of the lower Court in his favor reversed there, should not be allowed, where the amount is large enough, to take his case to the Privy Council. But the statute constituting the Supreme Court has determined otherwise. With respect to the exercise of the special prerogative, there might have been some ground for it in this case, if the petitioners could have shown that they had been placed in a position of great embarrassment and difficulty by the judgment of the Supreme Court. But this did not appear. Whether the trustees had or had not sufficient reasons to exclude Mr. Johnston from the use of a pew was not decided in the case. All the Supreme Court said was that the trustees had not taken the proper course, under the rules of their Church, to exclude him. As Mr. Justice Ritchie put it: "They and a large majority of the congregation were desirous of getting rid of this gentleman. It is my opinion, with reference to this matter, if they desired to get rid of him legally and properly, they had a right to take such action as would accomplish the object in view; but I cannot assent to the proposition, that to accomplish what they could not do legally, they had a right to pursue another course and refuse to let him have his pew, and

thereby prevent him from continuing to be a member of that congregation." No special reason was apparent, therefore, for the exercise of the prerogative, and to have allowed an appeal under the circumstances would simply have been to encourage similar applications in almost every suit decided by the Supreme Court.

INSURER AND INSURED.

The judgment of the Court of Appeal of Ontario in the case of *Billington v. The Provincial Insurance Company*, which we print in this number, decides a question of vast importance in the law of Fire Insurance. It deals with the power of the Company's agents, or of the party effecting the insurance, to vary by mere loose conversations the contract embodied in the application and the policy. The majority of the Court have adhered to the principle, fully recognized as applicable to contracts of other kinds, that the agreement of the parties must be gathered from the terms of the written contract, and not from parole evidence of what one of the parties supposed to be the agreement. In this case there was an omission to state the previous insurance in another company. The agent was verbally informed that there was another insurance, but the amount was not specified, and there was no mention whatever of the fact in the application or in the policy. It may seem hard in such a case that the insured should suffer. But clearly he could not recover unless the contract were changed, and another contract, to which the Company did not assent, were substituted. If the Courts treat such variations as immaterial, where will the laxity end? Even as it is, insurance contracts in too many cases are not looked upon as solemn agreements imposing obligations on each party as well as giving rights. The premium is paid like a tax bill, and there the matter rests, unless a fire occurs and the policy has to be produced as the basis of a claim. As Chief Justice Moss remarks: "In other business transactions men ordinarily scrutinize with care the terms of important contracts. In the case of insurance contracts inattention seems to be the rule." If the decisions of the Courts encourage this habit of inattention, there will be no safety or

certainty for the contracting parties. It is preferable to lay down at once a rule, however stringent, that has the merit of being easily understood and applied, rather than open the door to the tremendous mass of litigation which must inevitably proceed from confusion and uncertainty on so important a subject.

REPORTS.

COURT OF ERROR AND APPEAL.

Toronto, December 17, 1877.

Present:—Chief Justice Moss, Justices BURTON PATTERSON, and V. C. BLAKE.

BILLINGTON V. THE PROVINCIAL INSURANCE COMPANY.

Fire Insurance—Omission to state previous Insurance—Verbal Notice to Agent.

The plaintiff when making application for insurance mentioned to the defendants' agent that there was a previous insurance in the Gore Mutual, but could not remember the amount which was on the property insured with the defendants. The policy contained a proviso that in case the insured should have already any other insurance against loss by fire on the property, and not notified to the Company and mentioned in or endorsed upon the policy, the insurance should be void. The policy contained no mention of the insurance in the Gore Mutual. *Held*, that the plaintiff could not recover.

Moss, C. J.—All the facts which, in my judgment, are material to the decision of this case, lie within a narrow compass, and are not open to serious controversy.

On the 6th February, 1875, the plaintiff applied to the defendants, through Robert W. Suter, their local agent at Dundas, to effect an insurance against loss by fire to the amount of \$8,000, for two months, on certain agricultural machinery in process of construction in a manufactory in Dundas. He signed the defendant's usual form of application, which contained a direct enquiry as to other insurances, and an express agreement on the part of the applicant, that the application should form a part and be a condition of the insurance contract. Suter's authority extended to receiving applications for insurances, and receiving premiums and issuing interim receipts for policies. These receipts are sent to him by the defendants in blank, and filled up by him as occasion required. Their form was that of an acknowledgment of the receipt of money as a premium for an insurance, to the extent of a named sum, upon property described in an application, subject, however, to the approval of the Board of Directors, in Toronto, to whom power was reserved to cancel the contract at

any time within thirty days from the date of the interim receipt, by mailing a notice. This receipt embodies, in express terms, a mutual agreement that, unless it be followed by a policy within the said thirty days, the contract of insurance shall wholly cease and determine, and all liability on the part of the defendants be at an end; and that the non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of the contract by the Board of Directors, and appropriate provision is made for returning the unearned part of the premium. Although Suter does not appear to have been specially authorized to receive and transmit notices of other insurances, he was, in fact, the medium through which such notices were generally forwarded to the Company's head office. In answer to the enquiry respecting other insurances, the application, as signed by the plaintiff and transmitted to the head office by Suter, stated that there were two, viz., one in the Hastings Mutual of \$2,000, and one in the Canadian Mutual of \$3,000. The plaintiff had, in fact, a policy with the Gore Mutual for \$3,000, which covered the property mentioned in the application to the extent of \$1,000. Suter was the agent of the Gore Mutual through whom this insurance had been effected. The plaintiff's own explanation of the way in which all reference to this insurance was omitted from the application may be thus summarized: Suter came to his office to get the application filled up and signed on Saturday night, just before the time for paying his workmen. They found the other policies, but not that of the Gore Mutual. It had been assigned to a building society; but, according to the plaintiff's belief, was still in his possession. The plaintiff spoke particularly of the insurance with the Gore Mutual, a part of which he thought to be on stock; but what part he did not know. As Suter did not know, plaintiff said to him, "I want you to wait until the men are paid, and we will find the policy." He did not want that (application) sent. Suter said, "I have all the particulars over at the office;" to which plaintiff replied, "Write in further insurance in the Gore Mutual, \$3,000." He says that he knew that was the insurance, and if defendants had a mind to take exception to it he did not care. Suter told him, "You can rest assured I will put that in before I send it off;" or, as plaintiff elsewhere puts it, that he wouldn't send it off until he saw him again. Plaintiff then signed the application and received the usual interim receipt. He did not see Suter again with reference to the matter until after the fire. He is very emphatic in his statement that he told Suter to put down the insurance in the Gore Mutual at \$3,000, and he gives as a reason for clearly recollecting this, that he knew that in the application it was a very important matter that all the particulars should be mentioned, and he did not

want the application to go without having all that in, or all that he knew about it. He relied on Suter's promise to insert the statement that there was an insurance in the Gore Mutual for \$3,000; and this, although he did not himself suppose that this property was covered to that extent.

The application was forwarded by Suter without any alteration or addition, and after some hesitation the Board, or the General Manager, decided to accept the risk, but no person connected with the Company, except Suter, had any knowledge of the existence of the policy in the Gore Mutual; nor does Suter appear to have made any further investigation. According to him, neither the plaintiff nor he knew whether the policy in the Gore covered the stock.

It was not the practice of the defendants to issue for risks extending over so short a period as two months, any formal policy, but a certificate stating that the person has insured under and subject to all conditions of the defendants' policies, of which the assured admits cognizance. To this certificate there is appended a foot note that, in the event of loss, it will be replaced by a policy, if required. Within thirty days from the date of the application the defendants seem to have issued such a certificate in favor of the plaintiff. The fire happened after the expiration of the thirty days, but within the two months. Curiously enough, the plaintiff denies the receipt of any such document. If we were to accept this denial as conclusive, the plaintiff would probably be out of court; for by the express terms of the interim receipt the non-delivery of a policy (for which the certificate is only a substitute) within the specified time is absolute and incontrovertible evidence of the rejection of the application by the Board of Directors. The plaintiff's own statement, if treated as conclusive, must place him in a plain dilemma. He could not sue upon the interim receipt because the loss occurred after the thirty days, during which, at most, it protected him. On the other hand, the continuance of the insurance was expressly made dependent upon the delivery to him of a policy, and his inability to produce one would have defeated any assertion of claim against the defendants.

After the fire the defendants did issue a policy to the plaintiff, in their usual form, endorsed with their ordinary conditions, one of which is that notices of all previous insurances shall be given to the defendants and endorsed on the policy, or otherwise acknowledged by them in writing, at or before the time of the making assurance thereon, or otherwise the policy shall be of no effect. In the body of the policy is a proviso that in case the assured shall have already any other insurance against loss by fire on the property, and not notified to the Company, and mentioned in or endorsed upon the policy, then the insurance shall be void and of

no effect. The only insurances mentioned in or endorsed upon the policy which the defendants issued to the plaintiff are those in the Hastings Mutual and Canada Mutual.

The plaintiff commenced one action in the Court of Queen's Bench upon this policy, and declared in the usual way. The defendants pleaded, with other pleas, the conditions to which I have referred. To this the plaintiff replied on equitable grounds, and also added a count to his declaration by which a reformation of the policy was sought. This count, after stating the terms of the policy as in the first count, alleges that at the time of effecting the insurance the plaintiff had an insurance in the Gore Mutual to the extent of \$1,000, of which the defendants had notice before and at the time they effected the risk, and that with such knowledge they agreed to accept the risk and to insure the plaintiff's property, and to mention the other insurance in the policy, or have it endorsed thereon; and that by mistake they omitted to do either, of which the plaintiff had no knowledge until after the loss; and that the policy ought to be reformed and amended by the mention therein of the existence of the policy in the Gore Mutual of \$1,000. It then claims in effect that the policy should be treated as reformed, and the plaintiff be entitled to recover upon that footing. The defendants answered this count by two pleas. By the first they denied notice of the Gore Mutual policy, and the agreement to mention it in or endorse it on their policy, and the alleged mistake. The second plea set up the conditions previously referred to, and that the applicant shall be bound by his representations on making his insurance, and if the agent of the Company makes the application for the insured he shall be considered the agent of the insured and not of the Company; that the plaintiff made his application through Suter, the agent of the defendants at Dundas, and that the application was in writing and was forwarded to the defendants at their Head Office in Toronto; and the defendants' policy now in question was issued thereon, that the application contained no statement or mention of the policy of \$1,000 in the Gore Mutual, nor had the defendants, or their directors, or any of the officers of the Company at the Head Office any notice of such policy before the making of the application, or of the defendants' policy, although the plaintiff had communicated the existence of the said policy of \$1,000 to Suter at the time he made his application, but Suter had no authority from the defendants to change, or vary, or waive the said conditions, and he did not give the defendants any notice thereof, and the defendants had no notice unless the notice to Suter was notice to them, which they deny. That immediately after the application of the plaintiff the defendants' policy was delivered to him, and he was aware and had the means of knowing that the policy of

\$1,000 was not endorsed or otherwise acknowledged by the defendants in writing, and that he was guilty of laches in not seeking sooner to reform the policy. That the conditions on the policy were made expressly with the intention of preventing fraud and collusion between the insurer and the agents of the Company by requiring the knowledge of the Company, and that if applications are made for insurance by an agent of the defendants he shall be considered the agent of the insured and not of the defendants as to the application, and that they are not bound by the notice to a knowledge of Suter without their acknowledgment endorsed on the policy, or otherwise expressed in writing, and that the policy of \$1,000 was not omitted to be endorsed on the policy of the defendants, or otherwise acknowledged in writing through any error or mistake of the defendants. Similar allegations are contained in the plaintiff's equitable replication to the third plea to the first count and the defendants' rejoinder thereto.

At first sight this record seems rather complicated and embarrassing, but I think there is no doubt that the substantial question to be determined is whether the plaintiff has an equity to have the policy reformed. He cannot succeed if the policy remains in its present shape. Either the condition as to giving notice of existing insurances must be expunged or the policy must be reformed and amended as the added count puts it by the mention therein of the existence of the policy in the Gore Mutual of \$1,000. The former alternative is out of the question for the defendants have an undoubted right to provide for the case of the insurances in the Hastings Mutual and the Canada Mutual. The case then is to be determined on precisely the same principles as if the more correct and convenient course had been adopted of filing a bill for the rectification of the policy. It might perhaps be surmised that the plaintiff would have sought relief in that mode, and from the appropriate forum, if he had not clung to the hope that by suing at law he might obtain the advantage of the opinion of a jury.

The plaintiff's right to recover being dependent on his right to a reformation of the instrument, the question is whether he can consistently, with the established doctrines of equity, obtain that relief. I take it that the principles upon which the Court acts are clear and well-defined. They have been amply illustrated and explained in modern cases, but they were long since enunciated with considerable precision. Before the Court will assume to rectify an instrument it must be satisfied beyond all reasonable doubt that there was a common intention different from the expressed intention, and a common mistaken supposition that it was correctly expressed. It is essential that clear proof should be adduced of a real agreement between the parties different from

the written agreement. If it appears that the instrument was executed under a common mistake as to its contents, but no real agreement had ever been concluded between the parties, there may be rescission but there is no foundation for rectification. In order that a decree for reforming the instrument may be made, the plaintiff must prove not only that by mistake the written agreement does not correctly represent the real agreement, but that there was a mutual binding assent by him and the other party to a complete agreement.

Hinkle v. Royal Exchange Assurance Company, 1 Ves. Senr., 317, which came before Lord Hardwicke in 1749, was a suit brought for the rectification of a policy on the ground that there was a mistake in stating the intention of the parties, which was that the warranty should not have been so general, viz., should take place from Ostend only and not from London. The evidence on the part of the plaintiff was the deposition of one Knox, who seemed to support the plaintiff's view, and another person, whose account of the transaction was not precisely the same, although the report is silent as to the extent of the variance. His Lordship said: "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced into writing contrary to intent of the parties on proper proof that would be rectified, but the plaintiff comes to do this in the harshest case that can happen of a policy after the event of loss happened to vary the contract, so as to turn the loss on that insurer who otherwise it is admitted cannot be charged. However, if the case is so strong as to require it, the Court ought to do it. The first question is whether it sufficiently appears to the Court that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement." "As to the first, it is certain that to come at that there ought to be the strongest proof possible, for the agreement is twice reduced into writing, in the same words, and must have the same construction, and yet the plaintiff seeks, contrary to both these, to vary them, and that in a case where the witnesses on the part of the plaintiff vary from each other."

Booke v. Lord Kensington, Sir W. Page Wood, V. C.

In *Mackenzie v. Coulson*, L. R., 8 Eq. 368, a bill was filed by underwriters for rectification of a policy of marine insurance delivered to the defendants, so as to make it conformable to that which they alleged was the real contract. The defendants denied that they ever entered, or intended to enter, into any contract other than that expressed by the policy. Sir William James, then Vice-Chancellor, held that there was no evidence of any other contract, and in delivering judgment, observed: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been

made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument. It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiations which preceded it."

The judgment of Lord Chelmsford in *Fowler v. Fowler*, 4 Dig. & J., is very valuable and instructive. He points out that while the power which the Court possesses of reforming written agreements, where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and usefully exercised, it is also one which should be used with extreme care and caution, and that to substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. He refers to Lord Thurlow's opinion that the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence; and after intimating that the word "irrefragable" may require some qualification, he proceeds: "It is clear that a person who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest and most satisfactory manner, that the alleged intention, to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution; and also must be able to show, accurately and precisely, the form to which the deed ought to be brought. In these is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties, for whom the Court is virtually making a new written agreement."

The rule seems to be very well expressed by Spencer, C. J., in *Lyman v. United Insurance Co.*, 17 Johns, 373, to which I refer because its object was to have a policy of insurance amended after the loss. The learned Judge forcibly observed that it is not enough in cases of this kind to shew the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it, in other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and as in fact it was, but for the mistake. He adds: "If it be clearly shewn that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shewn that the other party agreed to it in the same way, and that the intention of both of

them was by mistake misrepresented by the written contract."

These authorities leave no room for uncertainty as to the principles upon which this remedial equity should be administered. Let us endeavor to apply them to the facts of this case. The plaintiff is bound to prove clearly that there was a real agreement between him and the defendants different from that expressed in the policy. He must show that there was a mutual assent to the terms which he says should be expressed in the policy. In order to succeed he must shew that there was an assent by the company to the insertion in the policy of the existence of the \$1000 insurance in the Gore Mutual; or, to put it in the broadest and most liberal manner for the plaintiff an agreement mutually assented to that he should be insured from the 6th February until the 6th of April notwithstanding the existence of this other insurance. Nowhere did the company enter into such an agreement. How or by whom was their assent given to any such term? The answer given is: by the agent Suter. But this seems to me to rest on an entire misapprehension of his functions, either actual or assumed. He neither had nor pretended to have authority to give the Company's assent to any contract of insurance for two months. He did not undertake, either expressly or impliedly, that the policy should be issued in a certain form or embody certain terms, for he did not undertake that a policy should be issued at all. The plaintiff did not suppose that in what took place between him and Suter the latter was binding the Company to such a contract as that which he now seeks to enforce. He knew that Suter was not assuming to do more than to forward his application for the consideration of the Board, and to insure him until he was advised of the result, or for 30 days at most. He was perfectly well aware that the proposal to which the Board was asked to assent was his written application and his own statement already quoted shows that he was fully alive to the importance of the application containing correct information as to existing insurances. Conceding that the evidence establishes with sufficient clearness that Suter had notice of the fact that the particular property in question was insured in the Gore Mutual, that does not advance the plaintiff's case. His knowledge of that fact would not create a contract of the Company which neither he nor the plaintiff supposed was being made. Notice to him might reasonably and justly be treated as notice to the Company for the purposes of any contract which he was then, as agent, making on behalf of the Company; but I cannot perceive how it can import a term into a contract which was not to be made through him, but which, to the knowledge of the plaintiff, was beyond his functions.

Then if the assent was not given by Suter it was never given, for it is clear that the author-

ities at the head office had no idea of the existence of the other insurance. If Suter did not no one on behalf of the defendants did, agree to insure the plaintiff for two months, notwithstanding the other insurance. On the 19th February, when the Board agreed to insure the plaintiff for that period, they acted upon the application and upon it alone. It appears that it was after some hesitation they accepted the risk. The Court is not at liberty to assume that it would have been accepted had the Board been aware of the additional insurance. Indeed, this case appears to me to involve precisely the same considerations as led Sir John Stuart to afford relief in *Fowler v. Scottish Equitable* 28 L. J. Ch. 225.

I believe that the soundness of that decision has never been questioned and its appositeness will justify a brief reference to it although it has been frequently referred to in our reports. The Plaintiff applied to the London agent of the Defendants to effect an insurance upon the life of a person named Haire, in whom they were interested. Haire was a merchant residing at Gibraltar, and in the course of his business was in the habit of visiting ports in Morocco and other ports on the Mediterranean and on the coasts of Africa and Asia. The plaintiffs allege that they notified the London agent of these facts, and that they expressly stipulated with him that the policy proposed to be granted on the life of Haire should not be vitiated by his visiting such ports on certain conditions, which were only arranged after much discussion. Upon the faith of this agreement and before any policy was actually issued, the plaintiff paid the first premium. The policy, when issued, provided that if Haire should depart beyond the limits of Europe, it should be void, but upon it was endorsed a memorandum that Haire should be at liberty, without license or extra premium, to visit Tangiers or any other port within the Mediterranean; but that it was understood that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia or Africa. It was alleged that the mistake was in the endorsement being limited to Tangiers and ports in the Mediterranean, instead of extending to any ports on the coasts of Africa or Asia.

The Queen's Counsel pointed out that the course of dealing and the evidence in the cause shewed that whatever the general authority of Cook might have been as an agent, what actually took place was that the agreement which the plaintiff intended to make was to have its force and legal effect from an instrument to be executed in Edinburgh. The London agent could negotiate the terms of a policy with any person desirous of effecting one with the Society, but the policy itself was an instrument to be made in Edinburgh, which was the headquarters of the Society. The agreement, in the opinion of the V. C., was made in plain and

distinct terms, as the plaintiffs contended. But the proposal in writing was, by mistake, made in different terms. The agent in London communicated this proposal with its erroneous terms. Upon this the V. C. proceeds to say: "To that proposal which was not the real agreement the Edinburgh directors assented, and what is sought to be reformed is the memorandum which was signed by the Edinburgh agent and adopted by the Board as that which constituted the agreement. That Edinburgh manager is now sought to be made to sign under the decree of the Court as having agreed to it, a certain stipulation of which he never heard. It seems quite enough to say that an agreement means that both contracting parties are of one mind. Here one of the contracting parties to the instrument which is now sought to be reformed confessedly never heard of that which is said to be the real agreement. The result, upon the whole, is plain that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. The plaintiff who made the agreement with the London agent never intended to be bound by the stipulation, which he himself proved is a mistaken form. The result is that there is no agreement at all." He afterwards points out that the agreement sought to be rectified is that which was made by the managers in Edinburgh, just as the instrument sought to be reformed here is the policy made by the head manager in Toronto. The parallelism between the two cases is so plain that commentary is superfluous. Although I have not taken into consideration in arriving at a decision the mode of procedure followed in this case, I cannot help observing that it appears to me highly inconvenient and anomalous. The plaintiff sues upon a policy as a perfect and complete instrument, under which he is entitled to certain rights. Then in the same action he is permitted to say:—"That is all a mistake. The instrument on which I am suing is not the real contract, which is something else." Elastic as are our present rules of pleading, they cannot be stretched to the length of sanctioning such a record. In the words of Wood, V. C.:—"No single instance has been produced in which a plaintiff bringing forward a document on which he founds his right, has been allowed to say that the instrument which he himself produces to the Court, does not express the real agreement into which he has entered."

I venture to think that the principles which underlie the judgment I have formed in this case are neither harsh nor unreasonable. It is the duty of Courts to give effect to the rights of Insurance Companies, as well as to protect the just interests of the assured. This is a mere truism, and perhaps, on that account, is in danger of sometimes being treated with neglect. It may be

reasonable and proper to hold a Company bound even by loose dealings with, or informal notices to a local agent authorized to grant *interim* receipts, so far as may be necessary to support the *interim* assurance. The Company has accredited him to the public as their representative for the purpose of making those temporary insurances, and for that purpose he may fairly be treated as the full equivalent of the Company. But when a Company has taken every precaution to limit his power to that extent, when they do their best to secure correct statements in writing from applicants, when they endeavor to make it be understood that it is upon the faith of these statements, and not upon any conversations with, or notice to, their agent, they intend to act there seems to be no injustice or harshness in requiring applicants to use some degree of caution. If a Company is to be held bound after a loss has occurred to alter a policy, which they have deliberately issued in strict accordance with the terms of the written application, containing all the information their governing body had for the exercise of their judgment, simply because their local agent knew and did not communicate some material circumstances, it is almost equivalent to transferring to the agent the power of issuing the policy. In other business transactions men ordinarily scrutinize with care the terms of important contracts. In the case of insurance contracts inattention seems to be the rule. No doubt this arises in some degree from the length and complexity frequently characterizing policies. But it is to be remembered that Courts of Equity demand reasonable vigilance. In the words of James, V.C.:—"Men must be careful if they wish to protect themselves, and it is not for this Court to relieve them from the consequences of their own carelessness."

I think the appeal should be allowed, but as the company incurred no risk after the 20th February when the short date policy was presumably received by the plaintiff, there should be an order for the return to him of \$, being 4-5th of the premium, and as to costs, I think justice will be done by following the course taken in Fowler's case and awarding none to either party.

BURTON, J.—I agree with the learned Chief-Justice, that although the issues on this record are most artificially framed, presenting claims of a wholly inconsistent character, the substantial question presented for determination is whether a case has been made for a reformation of the contract; and giving full effect to the Vice-Chancellor's view of the evidence, I am unable to discover any grounds upon which, according to the rules of equity, as I understand them, such relief can be granted.

Had the policy been executed and delivered to the plaintiff, and retained by him for any length of time before the fire, and he had, under such circumstances, brought an action

upon it, it would have required evidence of the most conclusive and unquestionable character to warrant a Court of Equity in interfering.

In the present case the policy was not delivered until after the fire, but to give the plaintiff a *locus standi* at all it must be assumed in his favor that a short-date receipt or certificate was issued within thirty days from the issue of the interim receipt.

That short-date receipt entitled him to a policy from the Company in their usual form containing the usual conditions, and based upon the written application which the directors had before them when determining whether to accept or reject the risk.

Taking the view most favorable for the plaintiff, and laying aside for the present any questions arising upon the pleadings or the necessity of reforming the contract, in what position was he to enforce his claim upon the short date receipt at the time of the fire had he elected to file a bill in equity, instead of requiring the issue of a policy, and proceeding upon it at law?

Suter, as agent of the Company, had authority to do two things: 1st. To receive and forward to the board of directors for their acceptance or rejection written applications for insurance. 2nd. To grant *interim* receipts insuring the applicant, pending the consideration of that application, not extending under any circumstances beyond the period of 30 days.

Within these limits the Company were liable upon his contracts as fully as if made under the Corporate Seal, and they would be subject to all the incidents attaching to contracts generally, and notice therefore to him would be notice to them as far as that *interim* contract was concerned.

I take it also to be clear that so far as the *interim* contract was concerned, a verbal notice to the agent of existing assurances would have been sufficient, the *nota bene* at the foot of the *interim* or provisional receipt, which is the only portion of that contract which renders it necessary to take any notice of other insurances, not requiring the notice to be in writing. But for this N. B., no notice of other insurance would as regards the *interim* insurance have been necessary at all, and one can see a reason therefore for its being thus pointedly called to the attention of the applicant, whilst the dispensing with the necessity of a written notice to the agent is apparent, as the information was merely to enable him to judge whether he should entertain the application or reject it.

This, however, is the only condition applying to the provisional insurance—with that exception, it is an absolute and unconditional contract—but that contract was subject to cancellation at any time by the Board of Directors by causing a notice to that effect to be mailed to the applicant, and unless a policy were issued upon the application to be forwarded to the

directors for their approval within 30 days, the provisional contract ceased and determined.

But the plaintiff was aware that the agent's power to bind the company was limited to a provisional contract of this kind, and that the ultimate contract of insurance depended upon the view which the directors might take of the risk, founded upon the information contained in his written application. He was aware that the directors attached importance to the full disclosure of other insurances, for his attention had been expressly called to it in the foot-note to his receipt, and was himself under the belief that such disclosure was material, as is evidenced by his anxiety to have it inserted in the application—whether it was in fact material must depend upon the contract itself which was entered into.

It is expressly agreed that the application shall form part and be a condition of the contract of insurance.

On that application the enquiry is made, what insurance is effected on the property now to be insured and with what companies. To this the applicant applies: "Hastings Mutual \$2,000, Canadian Mutual \$3,000," saying nothing of that of the Gore.

This is forwarded to the Board of Directors, and is in fact the only information before them when called upon to form their opinion upon the risk.

The Directors accepted the risk, but as was their practice with short date policies, instead of issuing a formal policy, granted a certificate to the effect that the plaintiff had insured under and subject to all the conditions of the defendants' policies, of which the plaintiff admits cognizance, the property in question.

The policies issued by the company contain a proviso that in case the assured shall have already any other insurance upon the property not notified to this company and endorsed on this policy, the insurance shall be void, and a covenant that the representation given in the application contains a just, full and true exposition of all the facts and circumstances in regard to the risk and to the condition, situation and value of the property and the interest of the assured therein, and if the same be not truly represented the policy shall be void.

The sixth condition required that notice of all previous assurance shall be given to the company and endorsed on the policy or otherwise acknowledged by the company in writing, otherwise the policy will be of no effect.

The nineteenth condition requires that all notices required for any purpose must be in writing.

The issuing of the policy by the Company with notice of any existing insurance must, of course, be regarded as an assent to such additional insurance, and they could be compelled in the event of their refusal to endorse it on the policy as required by the condition. And the

same effect must be given to the certificate, but the question still remains, What was the contract effected by this proposal and acceptance? Can it be anything more than this? We have accepted the risk offered upon the premises, and agree to insure them for the time specified, provided the facts and circumstances in regard to the risk and the condition, situation and value of the property be as represented in the application, and that the insurances which you have notified us of in that application are the only other insurances existing upon it, and we will, if you require it, issue you a policy containing similar stipulations.

That it was the intention of the Company that all such notifications should be made to the head office in writing is manifest, I think, not only from the fact of their making a specific enquiry as to such further insurances in the application, but also from the proviso near the foot of the policy which, after referring to the sixth condition, further provides that if any additional insurance be effected on the property the assured shall at once give notice to the head office, and have it endorsed on a certificate of consent given.

They appear to have endeavored to guard against any misapprehension or mistake by providing that the information upon which the Directors were to act should be in writing, and in guarding in the body and conditions of the policy against being bound by notices given to agents, except only in the case of the provisional receipt. If they have failed to accomplish this object it is in consequence of the insufficiency of the language used to convey their meaning, and to my mind they have sufficiently expressed it, and all parties, I think, clearly understood that the application was the basis, and the only basis upon which the plaintiff proposed for insurance, and by which alone the Directors intended to be bound; that and its acceptance alone constituted the contract, and the sooner people learn that this is the mode in which these insurances are effected, and that their effect is not to depend upon loose conversations with agents, in my opinion, the better.

I am quite unable to concur in the view that the Company can be prejudiced, because they issued the policy after receiving the proofs of loss in which this additional policy was referred to. They were bound in accordance with the certificate they had granted to issue a policy, but they were not bound to endorse upon it the fact of another insurance existing of which they had not been notified. I am of opinion, therefore, that if this were a bill filed upon the short date certificate to enforce payment of the insurance money the plaintiff must have failed, as he must fail now, because he establishes no such contract as alleged, and there is nothing, therefore, to reform by. I am of opinion, therefore, that the appeal should be allowed.

BLAKE, V. C.—The evidence is not satisfactory to my mind, in support of the allegation of notice to the agent, of the insurance in the Gore District Mutual Insurance Company. In the Court below the testimony given was considered sufficient to support this finding which must be taken in appeal as the true conclusion from the evidence. I think a verbal notice to the agent, such as that here found to have been given, is sufficient on an application for the usual *interim* receipt. This receipt, however, only binds for 30 days from its date. As the fire took place after the expiration of the 30 days, the plaintiff can have no claim thereunder. He is, therefore, obliged to base his claim to recover either on the short date or usual policy. It then becomes a dealing between the plaintiff and the Company. The short form of policy was issued "subject to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance." Looking at the application, and looking at clauses 6 and 19 of the conditions on the policy, it is clear that it was intended that the information as to prior insurances should be in writing. The power of the agent ended in the matter with the dealing on the footing of the certificate. Then came the contract between the plaintiff and the Company represented by the short form policy. This required the notice in writing, which was not given, and I therefore think the plaintiff is disentitled to succeed.

I coincide in the view taken by the Chief Justice of the Court as to the disposition of the costs of the litigation.

PATTERSON, J., dissented from the judgment of the Court, and held that the notice to Suter was sufficient. He considered it quite clear that the plaintiff was anxious to have the Gore Mutual policy inserted in the application, and that Suter spoke of having some memorandum at his office which would enable him to state the particulars of it. The plaintiff depended upon Suter inserting the particulars. It appeared, however, that Suter had only a note of the gross amount of the Gore Mutual policy, and not of the particulars, and he sent away the application as it was. The plaintiff's rights must depend not on any estoppel, but on the effect of what was done as a matter of contract. On this branch of the enquiry, the learned Judge remarked that he had had great fluctuations of opinion, and he was still by no means free from doubt. But after anxiously considering all the data from which the contract was to be deduced, he could not see that the defendants could insist upon more than was done by the plaintiff. The insurance effected by an interim receipt and that evidenced by a policy is one contract of insurance, evidenced in the first place by the receipt and continued by the policy. The omission to notice the existing policy in the application was not of itself fatal. Undoubtedly there must be notice given of the

insurance—the reasonable import of the form of application and the express provision of the policy agreed in that, but did not make it indispensable that notice should be contained in the application paper. In entire consistency with this was the N. B. at the foot of the interim receipt: "Any existing assurance on the property must be notified at the issuing of this receipt or the contract is void." The agent had verbal notice that there was an insurance, the amount of which the plaintiff could not at the moment state, but which he emphatically insisted on as one to be taken notice of. If what was proved to have been said about it had been written on the face of the application, it would have been out of the question to urge that the want of more particular information made the notice of no avail. It would have been there to be acted on or remitted for further particulars, as the Company chose. It, therefore, seemed indisputable that notice of the existing insurance was given to the agent, the proper person to receive it. If the Company had then done what the receipt intimated was the routine, and either declined the risk or issued a policy, the matter would have been simple. The first case would speak for itself. In the second the plaintiff would have had notice that the continuance of the insurance from henceforth depended not on the notice alone, but on a further act, viz., the mention in or endorsement on the policy, which was at once the stipulated evidence of receipt of a notice, and of the Company's assent to the double insurance.

Appeal allowed.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, Dec. 14, 1877.

Present.—Chief Justice DORION and Justices MONK, RAMSAY, TESSIER and CROSS.

THE CANADIAN NAVIGATION Co., (Plffs. below) Appellants; and McCONKEY (Def't. below) Respondent.

Common Carriers—Loss of baggage—Fire on Passenger Steamer—Liability of carriers—Serment supplétoire.

Held, that a steamboat company is liable for the value of passengers' baggage destroyed by a fire on the steamer, unless it be clearly proved that the fire occurred from some cause over which the Company had no control.

2. That the Court of Review in the Province of Quebec may send a case back to the Court below, in order that the *serment supplétoire* may be deferred.

On the 10th June, 1872, the minor daughter of McConkey, the respondent, was a passenger on the steamer "Kingston," belonging to the

Company, appellants. A fire having occurred on board, the minor's trunk and contents, valued at \$142.50, were destroyed. An action was brought for the value of the baggage destroyed and other damages.

The appellants pleaded that the fire happened through *force majeure*, and by no fault of theirs, every precaution to guard against fire having been taken.

The Superior Court dismissed the action, holding that the Company were not guilty of negligence.

In Review this decision was reversed, and the respondent held entitled to recover; but the Court, considering that the value of the trunk and contents was not satisfactorily proved, ordered the record to be sent back to the Superior Court, in order that the *serment supplétoire* of the respondent might be taken as to such value. This was done, and subsequently judgment was entered for the amount so established.

The Company having appealed,

RAMSAY, J., for the Court, remarked that the evidence showed a reasonable amount of care on the part of the appellants, but there was no attempt to show how the fire occurred. The question arose, whether the Court had to consider a fire the result of *force majeure* in all cases where the cause did not appear. This view could not be adopted. The appellants ought to have established something more than they had done; they ought to have shown that it was not through their fault that the fire occurred. As to the principle of the action, the respondent rightly succeeded. As to the amount, the appellants had drawn the attention of the Court to the order of the Court of Review, sending the record back in order that the *serment supplétoire* might be deferred. Under the circumstances this was proper, and the judgment would not be disturbed.

Judgment confirmed.

J. L. Morris for appellants.

Macmaster & Hall for respondent.

NEW PUBLICATIONS.

THE AMERICAN LAW REVIEW, January, 1878.
Boston: Little, Brown & Co.

The *American Law Review*, which appears quarterly, has entered upon its twelfth year. It is edited with great care by Messrs. Moorfield

Storey and Samuel Hoar, and its summaries of decisions, to which we are indebted for many of the latest cases, are especially valuable. The January number contains, among other matter of interest, a well-written paper on "The Parliaments of France," from which we shall make some extracts in another issue.

ALBANY LAW JOURNAL, Vol. 17, No. 1, January 5, 1878; edited by Isaac Grant Thompson. Albany: Weed, Parsons & Co.

There is no falling off in the interest which the contents of the *Albany Law Journal* possess for the legal reader. The current number has a very readable notice of Rufus Choate, and his opinions on the celebrated trial of Professor Webster for the murder of Dr. Parkman.

CHICAGO LEGAL NEWS, December 29, 1877.

Chicago: Legal News Printing and Publishing Company.

This journal, issued weekly, and edited by a lady, Mrs. Myra Bradwell, evinces the same energy with which it was established ten years ago. It presents the bar with a large number of judicial opinions in advance of the regular reports, and in other respects fills, with marked ability, the position which it marked out for itself.

RECENT ENGLISH DECISIONS.

Bailment.—The plaintiff left his bag, worth more than £10, at the cloak room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak room, and the words "See Back." On the back it was stated that the Company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room, in a conspicuous place. The Judge left these questions to the jury: "1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the conditions?" Both questions were answered in the negative, and the Judge ordered judgment for plaintiff. *Held*, that there must be a new trial.—*Parker v. The South Eastern Railway Co.*, s. c. 1 C. P. D. 618.

Bill of Lading.—One hundred barrels of oil and one hundred and six palm baskets, consigned to defendants, were shipped under a bill of lading, signed by plaintiff, containing the clause: "Not accountable for rust, leakage, or breakage." Some of the oil escaped and caused damage to the baskets. In an action for the balance of freight, the consignees set up a counter claim for this damage. *Held*, that the exemption in respect of leakage did not extend to the damage by the oil which leaked out.—*Thrift v. Zoula*, 2 C. P. D. 432.

Company.—At a general meeting of the shareholders of a company, B., who owned no stock, was unanimously elected director. The shareholders at the time consisted of seven directors of the company, and there were no others. The articles of the company provided that no person who had not owned twenty shares for two months should be eligible as director, unless he had been recommended by the board of directors. B. refused to act, but the company sent him an allotment of twenty shares. On an order to wind up the company, *held*, that B. was not a contributory.—*In re East Norfolk Tramways Co.*, 5 Ch. D. 963.

RECENT UNITED STATES DECISIONS.

Accomplice.—A conviction may be had on the evidence of an accomplice, corroborated only by that of his wife.—*Blackburn v. Commonwealth*, 12 Bush, (Ky.) 181.

Action.—A city established waterworks, which any one might connect with his house and use, paying rates. The pipes in front of the house were so negligently laid, near the surface of the ground, that they froze and burst. In an action by the owner of the house against the city, *held*, that he could recover the rates paid while deprived of the use of the water, but not for damage to the house or loss of tenants.—*Smith v. Philadelphia*, 81 Penn. St. 38.

Adverse Possession.—Possession by a corporation cannot be tacked to a previous possession by the individuals forming the corporation, organized as a voluntary society for the same purposes, so as to make a title by adverse possession.—*Reformed Church v. Schoolcraft*, 65 N. Y. 134.

The Legal News.

VOL. I. JANUARY 19, 1878. No. 3.

POWERS OF BAR COUNCILS.

A case was decided during the December Term of the Court of Queen's Bench at Quebec, which, although disagreeable in its personal aspect, raised an interesting and important question as to the authority of Councils of the Bar in the Province of Quebec over the members of the profession, and also as to the power of the ordinary Civil Courts to interfere with the decisions of Bar Councils. The respondent, Mr. Brassard, had charged Mr. O'Farrell, a member of the Bar of the Quebec Section, before the Council of the Section, with conduct unbecoming the honor and dignity of the profession, in acting on a certain occasion as a constable in a case in which he, Mr. O'Farrell, had been engaged as attorney. The Council of the Bar of Quebec having found Mr. O'Farrell guilty, he obtained a writ of prohibition to restrain their proceedings, and the Superior Court maintained the writ. The case was carried to the Court of Review, and this tribunal, holding that the decision of the Council was subject only to an appeal to the General Council of the Bar, and not to the law courts, decided that the writ of prohibition had issued illegally.

It is a singular feature of this judgment that it apparently assumes to review and reverse not only the judgment of the Superior Court, but also that of the Court of Queen's Bench, the highest provincial tribunal, which had ordered the proceedings in prohibition. The decision of the Court of Review will be found reported in the Quebec Law Reports, vol. 3, p. 33. Mr. Justice Stuart remarked (p. 56): "The law in the clearest manner denies to any Court the right to interfere with the judgment of the Council touching the discipline and honor of that body. The principal features of the act of incorporation are taken from the practice in France, including that main and principal feature that the Bar shall exercise the powers of self-government untrammelled by Courts and with a right of appeal to the General Council from the Council of Sections, as the sole and

only remedy. There is then a remedy provided by the law for the members aggrieved by the Council of the Sections which is exclusive of all others, and while that exists the extraordinary remedy by prohibition does not lie. The scope and purpose of the prohibition is to keep inferior Courts within the limits of their own jurisdiction, and to prevent them from encroaching upon other tribunals. The Superior Court itself cannot practice an encroachment upon the tribunal of the General Council, under plea of restraining the Council of Sections."

It was this judgment which was brought under the notice of the Court of Queen's Bench. The judgment of the full Court was rendered last month by Mr. Justice Cross, and in view of the interest which the case possesses for the profession it is worth while to quote the remarks of the Judge *in extenso*, which we do from his Honor's notes. Mr. Justice Cross said:—

"The questions raised in this case are on a writ of prohibition issued out of the Superior Court at Quebec on the petition of O'Farrell, appellant, asking that certain proceedings against him taken at the instance of Brassard, the respondent, as prosecutor before the Council of the Bar, Section of the District of Quebec, be restrained.

"The writ was at first refused, but on an appeal to this tribunal was directed to be issued, did issue accordingly, and on trial and hearing before His Honor Mr. Justice Dorion was maintained by judgment rendered on the 6th of May, 1876. This judgment was afterwards, on the 7th December, 1876, reversed in Review by a Court composed of three Judges. The present appeal seeks to set aside the judgment in Review and to restore the judgment of His Honor Mr. Justice Dorion of the 6th May, 1876.

"The proceedings sought to be restrained were on an accusation framed by the Syndic of the Bar upon a complaint preferred by the now respondent, Brassard, on which he, O'Farrell, was cited before the Council of the Bar to answer to the charge which it contained, accusing him of conduct derogatory to the honor and dignity of the Bar.

"The judgment rendered on this complaint was within the terms of the accusation. It is unnecessary at present to refer particularly to

the terms of the accusation, as they were ample and in excess of the finding.

"The Council found O'Farrell guilty in the terms following:—

"1st. Having about the 26th of May, 1874, been named and sworn as constable at St. Etienne de la Malbaie, which charge he accepted voluntarily, in a prosecution wherein he acted for the complainant in his quality of advocate and attorney, thus cumulating in the same proceedings the functions of advocate and constable, and having on the night of the 26th or 27th May, 1874, accompanied by a dozen of men, as a constable arrested one Joseph Guay in the parish of St. Agnes.

"2nd. Having on the night of the 22nd or 23rd June, 1874, accompanied the bailiff charged with the arrest of one Alexander Murray dit Brunoche, of St. Agnes, farmer, and having aided and assisted in making the arrest.

"That he had thereby rendered himself guilty of infractions of the discipline and of actions derogatory to the honor of the Bar and to the dignity of the profession of advocate.

"Brassard, who was prosecutor, and now respondent, appears and supports the proceedings attacked by the prohibition and by the present appeal.

"The primary question raised is, Whether the Section of the Bar really possess the powers they have so assumed to exercise? In other words, Can they justify the assertion of these powers under the act of their incorporation and the amendments thereto?

"By Statute 29 Vic., cap. 27, sec. 3, the Corporation of the Bar are empowered to make by-laws, rules and orders for the interior discipline and honor of the members of the Bar.

"By Sec. 10, Sub-sec. 1, the Council of each Section have power for the maintenance of the discipline and honor of the body, and, as the importance of the case requires, to pronounce, through the Batonnier, a censure or reprimand against any member guilty of any breach of discipline or of any action derogatory to the honor of the Bar; and the Council may, according to the gravity of the offence, punish such member, by suspending him from his functions for any period whatsoever in the discretion of the said Council, not exceeding five years, subject only to appeal to the General Council, as therein after provided.

"3rdly. To prevent, hear, reconcile and determine all complaints and claims made by third parties against members of the Bar in the Section in matters connected with their professional duties.

"If the duty of the Court here required them to take cognizance of the evidence adduced before the Council, and to reform the finding, they would, in my opinion, be justified in re-stating it in a form more aggravated than it now appears of record, and it would then still be obnoxious to the same test that is now sought to be applied to its validity. The question that comes up to be solved by us is not whether the proof supports the finding, but whether, supposing the proof to be ample, the law authorizes any such finding—whether, in fact, any offence whatsoever known to or prohibited by the law, is stated in the judgment, or even in the complaint itself made in this case, against O'Farrell. I entertain no doubt that judicial functions are conferred on the different Sections of the Council of the Bar. Courts are constituted, by their act of incorporation, with the forms and other essentials for the trial of offences, infractions of discipline, and actions derogatory to the honor of the Bar; but how was it to be ascertained what constituted such infractions or derogation? What was lawful before the granting of this charter remained unforbidden by any law after it came into force. The Legislature had no intention to substitute the new tribunal thus erected in the room of any of those existing, having jurisdiction over infractions of the existing laws. In the absence of any such intention, the ordinary existing tribunals are presumed to retain their functions and to be sufficient for their fulfilment. What, then, were to be the duties of the newly created Courts? That question, it seems to me, is answered by reference to Section 3, which gives power to the Corporation to make by-laws, rules and orders for the interior discipline and honor of the members of the Bar. This is a quasi legislative authority empowering, not each particular Section for itself but the general body, to define by by-laws what should be considered infractions of discipline and actions derogatory of the honor of the Bar; and if they did so, within the bounds of reason and justice, their by-laws would be valid, and the different Sections, through their

Councils, would be the judges of the facts in any complaint brought before them, framed upon the by-laws, specifying the offences. They would be judges under a code of laws framed to give them jurisdiction, and thereupon any party considering himself aggrieved by their judgments, would have no other recourse save an appeal to the General Council.

"The complaint in such case would require a specification of facts constituting the offence as defined by the By-law. The form prescribed for voting guilty or not guilty, is peculiarly applicable as going to show the intention of the law.

"In the present instance there is a specification of facts, but there is no law to constitute these facts an offence. Mr. O'Farrell very naturally says: 'I was not warned that acting as a constable, or assisting a constable in arresting a person accused of crime, would be considered an offence, and up to the bringing of the complaint against me I considered it not only a proper but a laudable act, and I had this security that I knew there was no law against it; but had the Bar promulgated a By-law declaring it an infraction of discipline, or a degradation of its honor, to assist a common bailiff or constable, I should have been forewarned, and have avoided doing so. As matters stand, I feel that I have done no wrong, have broken no law.' It has been argued that he might have been compelled to act as constable. I concede that the Bar could make no law to punish him for acting by compulsion, but I can see no reason to prevent them from making a By-law to visit with their displeasure members of their Body who may volunteer to assume the lower-class duties of constable, particularly in cases where the same party had acted as attorney or advocate, and to prescribe that such conduct would be held derogatory to the honor of their body. I think that such a By-law would be perfectly within their powers; but without such forewarning prescribed in a legal manner, if to-day they can make a crime of acting as a constable, they may on any future occasion, without rule, and according to caprice, decree some other state of facts to constitute a like offence. If they can do so in regard to a constable, without previous warning, they might as well without such previous warning decree that Mr. O'Farrell should be suspended for acting as Colonel to a Regiment of volunteers.

"I think an analogy may be drawn from the practice in the Courts Martial, and the principles by which these tribunals are guided in their decisions. By reference to Simmons on Courts Martial, I find that Her Majesty was empowered by the Mutiny Act to make articles of war, under certain limitations, for the maintenance of discipline in the army, but there is no such thing as a prosecution for infraction of discipline generally. On the contrary, the articles of war carefully specify what shall be considered infractions of discipline, and prosecutions are required to specify the facts which bring each particular case within the article, of which the facts constitute an infraction; and cases are given where the findings were set aside for want of such specification; as, for instance, the case of Lieut. Imlack, found guilty of ungentlemanly conduct. Thus, the charge has to be supported by a statement of facts, and these facts must bring the case within one of the articles of war, defining the offence. In the present case we have a state of facts, but we have no article or By-law declaring any offence to which the state of facts can apply.

"I apprehend the customs prevailing in England or France, do not much assist by way of precedent. The associations of the Bar there were voluntary organisations and I believe in France, the decrees involved no consequences, that could be enforced by compulsion, save that the association struck from their roll whom they chose. This they could do without being accountable to anybody. The Courts, if they chose, being the actual power, could recognise the acts of the Bar, and through courtesy probably did, although not bound to do so. But as a person might be expelled from the society simply because he might have made himself disagreeable to the majority, and was consequently struck off their roll, there was really no power in the Courts to restore him, but the Courts themselves, possessing the power over the Advocates or Barristers, probably, and I believe did, always recognise the discretion exercised by the Bar in excluding those they had disapproved of, provided they deemed the discretion reasonably exercised. Nor is it likely they would without very strong reasons interfere between the Bar and a member they had excluded to permit him to practise against their decision. The difference here seems to be

that the practice in France has been taken and made the basis of a law involving reciprocal duties and obligations, imposing them as compulsory, and creating an authority to enforce them, thus making it obligatory, that such authority should be exercised in a lawful manner, and subjecting it to the control of the higher legal tribunals. The Bar of the Province of Quebec, having chosen to accept a charter of incorporation, and to assume the exercise of judicial functions, thereby conferred upon them, have as a consequence abdicated the right of arbitrary expulsion, and subjected their action to the supervision of the higher tribunals. The status of membership of their body has become a recognised legal right, which it is the duty of Courts to protect, and they will not permit it to be infringed without a valid and sufficient legal cause being shewn for so doing.

"If called upon to express my opinion of Mr. O'Farrell's conduct on the occasion I should make it very strong and decided, but that is unnecessary and uncalled for.

"According to the opinion of this Court the judgment of the Court of Review is to be reversed, and the order for prohibition made absolute, according to the original judgment of the Superior Court on the merits of the case."

Mr. O'Farrell's conduct is not approved by either the Courts or the Council of the Bar. But he gets the benefit of the absence of a by-law. This is more than a technicality. The judgment of the Appeal Court rests upon an important principle, that punishments are not to be awarded for indefinite offences, and especially at the pleasure of the majority of a fluctuating and almost irresponsible tribunal. The Councils of the Bar must not wait until something has been done, and then call it an offence; they must define beforehand what shall be deemed offences. If the Council of one Section choose to make acting as a constable an offence, another might place in the same category participation in the profits of money-lending and discounting, as, for instance, by holding stock in a bank; or the possession of shares in any other trading or manufacturing company, or the buying and selling of real estate as speculation. A majority of a Council might be found in particular circumstances voting in a very whimsical manner, and it is wise to place some

restraint upon their action, by compelling them to define the acts which they intend to punish as crimes.

THE ST. ANDREW'S CHURCH CASE.

In our reference to this case (page 13), it was inadvertently stated that the decision of the Supreme Court was unanimous. This was an inaccuracy; the Chief Justice and Mr. Justice Strong dissented in favor of the respondents, the Minister and Trustees of the Church. The Canadian Judges therefore stood exactly six to six—Justices Johnson, Monk, Sanborn, Tessier, Strong, and Chief Justice Richards for the Church, and Chief Justice Dorion and Justices Ramsay, Ritchie, Taschereau, Fournier and Henry for the pewholder.

REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, December 14, 1877.

Present.—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and CROSS.

THE MONTREAL, OTTAWA & WESTERN RAILWAY Co., (defts. below) Appellants; and BURY (plff. below) Respondent.

Agency.—Quantum Meruit.—Services in promoting interests of a Railway Company.

B. worked for several years, in a general way, to advance the interests of a railway company; he canvassed for stock, and assisted in the election of city councillors and others who favored the granting of aid to the undertaking. *Held*, that he was entitled to compensation for the value of his services, although he had not been promised any remuneration.

Bury, the respondent, from 1st December, 1870, to 1st July, 1873, rendered certain services to the company, appellants, who were engaged in the construction of a line of railway. The services consisted chiefly in securing the passage of by-laws by the corporation of the city of Montreal, and in certain counties and municipalities along the line of railway, authorising the subscription of stock in the company, and the granting of bounties. Bury was a stockholder in the company, and owned property along the proposed line of railway. Action, for value of services rendered. Plea, that Bury never was in the employ of the

company, and was never promised any remuneration for his exertions on its behalf.

The Court below (Mackay, J.) maintained the action for the sum of \$2000. The company having appealed,

Ramsay, J., dissenting, would be for dismissing the action altogether. There was no evidence of any engagement or promise of payment by the company. Bury, apparently, wished to be paid for the use of his influence. But he had personal grounds for doing as he did, it being proved that he had real estate to the value of \$20,000 in the immediate vicinity of the line of railway.

Dorion, C. J., for the majority of the Court, considered that Bury was entitled to be paid. He worked to promote the prosperity of a company already in existence, not to organize a new company, and the Vice-President testified that his services had been valuable. Too much, however, had been allowed for the work done, and this Court would reduce the amount to \$750.

Mow, J., concurring, remarked that there was nothing illegal or immoral in what Bury did, and the value of the services was fully established.

Judgment reformed.

J. M. Loranger for Appellants.

Doutre, Doutre, Robidoux, Hutchinson & Walker for Respondent.

THE ÆTHA LIFE INSURANCE Co. (plffs. below), Appellants; and ROOKLIDGE (def. below), Respondent.

Surety—Novation.

The appellants sent to a local agent a letter in the terms cited below, making an offer which the agent accepted. Held, that a new agreement was effected by the letter, and the surety was discharged.

The question was whether a surety had been discharged by a change in the terms of the engagement of the person for whom he was surety. The respondent, Rooklidge, was surety for one Reed, the agent of the appellants at St. John, N.B. The bond was conditioned for \$100, that Reed should faithfully discharge his duties in soliciting insurances for the company and should pay over all moneys. On the 30th of November, 1874, the appellants wrote the following letter:—

J. A. REED, Esq., St. John, N.B.

Dear Sir,—By referring to my letter of 21st inst., it will be observed that the old balance due from you is \$309.14 United States currency.

If you will remain in New Brunswick during the year 1875, giving your entire energies exclusively to promoting the Æthna Life Insurance Company's business therein, taking pay therefor in the shape of a commission of twenty per cent. on new business procured after January 1st, 1875, together with five per cent. on the renewals of all the Company's business in that Province, as they are collected by you, as specified in your original contract, I will wipe out all the above balance of \$309.14, and interest thereon, at the end of said twelve months—that is on December 31st, 1875.

It is understood that you may take the one-third out of the first premiums paid on any new business procured before the 1st of January, 1875, whether it be annually or semi-annually, and whether paid this year or during next, provided they are paid within the Company's rule of sixty days.

Your acceptance or rejection of this offer, expressed in fewest possible words, you will please indicate to me some time previous to the 15th of December, and oblige.

This was followed by a second letter, informing Reed that the balance against him was somewhat greater than mentioned above, but concluding as follows:—"However, it will all go into the one lump and be cancelled on the 31st of December, 1875, if you work the business through on commission during 1875, as stated in my last letter, and keep your accounts square with this office on that basis."

Reed accepted the terms proposed, but continuing to be remiss in his accounts, he was dismissed on the 21st August, 1875, when the deficiency had increased to \$830.

The Company having sued the surety, the latter pleaded that there was a new agreement effected by the letter cited above, of which he had no notice, and that he was discharged from liability. The Superior Court, Mackay, J., sustained the plea and dismissed the action as against the surety. On appeal by the Company the judgment was confirmed.

Judgment confirmed.

Trenholme & MacLaren, for Appellants.

A. & W. Robertson for Respondent.

LALONDE *dû* LATREILLE, (plff. below) Appellant; and DROLET, (def. below) Respondent.

Contract—Sale—Short Delivery.

By a writing *sous seing privé* L. purchased from D. 2265 cords of wood "as now corded at Port Lewis," for

the sum of \$4520, and by the same writing acknowledged receipt of the wood, declared himself satisfied therewith, and discharged the vendor, "*de toute garantie ultérieure.*" The purchaser having measured the wood, found it 423 cords short, and a portion of it rotten. Suit for value of wood not delivered and of the part that was rotten. *Held*, that by the terms of the agreement the sale was *en bloc* and not by the cord, and the purchaser could not recover.

Judgment confirmed.

M. E. Charpentier for appellant.

Duhamel & Rainville for respondent.

THE EASTERN TOWNSHIP BANK (plffs. below),
Appellants; and MORRILL (one of the defts.
below), Respondent.

*Amendment of writ—Erroneous description of firm—
Exception to the form.*

A firm, originally composed of two partners, admitted a third. The change was not registered, and the firm was sued as if composed of the first two partners only. Service was made at the place of business of the new firm. *Held*, that the plaintiffs were entitled to amend the writ by inserting the name of the new partner, and an exception to the form, attacking the amendment, pleaded by the new partner when thus brought into the case, was dismissed.

The appellants sued a firm of H. S. Beebe & Co. on promissory notes. The firm was described as composed of Anson Beebe and H. S. Beebe; but it appeared that a third partner, the respondent Morrill, had been admitted into the firm, though the change had not been registered. The service had been made at the place of business of the new firm. The plaintiffs obtained leave to amend the description of the defendants' firm in the writ, so as to include Morrill's name, and a copy of the amended writ was served upon Morrill personally at the place of business of the firm. Morrill appeared and pleaded an exception to the form, based, among other grounds, upon the alleged insufficiency of the service, the return day of the original writ being past before the service of the amended writ.

The Superior Court at Sherbrooke (Doherty, J.) dismissed the exception, "considering that the allegations of the said *exception à la forme* are in the nature of an opposition, or protest against the interlocutory judgment of this Court, granting plaintiffs' application to amend the writ of summons in this cause, that plaintiffs' proceedings under and since said amendment are legal and regular, and that the said

allegations are irregularly pleaded in this cause, and moreover insufficient in fact and in law." The Court of Review at Montreal reversed this judgment, "considering that the exception *à la forme* filed in this cause is well founded and should have been maintained, and that the plaintiffs' action should have been dismissed with regard to the said John F. Morrill." It was from the latter decision that the plaintiffs appealed.

DORION, C. J., for the Court, held that the original judgment should have been maintained, and that rendered by the Court of Review must, therefore, be reversed. The grounds assigned by the judgment in appeal are as follows:

"Considering that the writ of summons in this cause was properly amended, leave having first been obtained from the Superior Court, by inserting the name of the respondent John F. Morrill, as being one of the partners in the firm of H. S. Beebe & Co., defendants in this cause, and that the amended writ and declaration were duly served on the said respondent;

"And considering that the said respondent has pleaded to the action, and has suffered no prejudice or injury from the said amendment being so made, and that the exception *à la forme* by him filed is not well founded;

"And considering that the appellants have proved the material allegations of their declaration, and the said respondent has failed to prove the allegations of his several pleadings;

"And considering that there is error in the judgment rendered by the Judges sitting in Review on the 30th September, 1876, reversing the judgment by the Superior Court sitting at Sherbrooke on the 6th of April, 1876, and dismissing the appellant's action as against the said respondent John F. Morrill:

"This Court doth reverse and set aside the said judgment of the 30th Sept., 1876, and doth confirm the said judgment rendered by the Superior Court on the 6th April, 1876."

Judgment reversed.

Brooks, Camirand & Hurd, for Appellant
Terrill & Hackett, for Respondent.

NOTE.—The following appeals, also decided on Dec. 14, do not require special notice:—

BARTON & BOYER. — Judgment granting the insolvent Boyer his discharge, was confirmed.

MITCHELL & BURKE.—Mitchell having failed to give Burke, his landlord, due notice of his desire to terminate the lease of a house, paid the next year's rent under protest, and then sued the landlord for the amount, on the ground that he had violated his agreement to do his best to obtain a tenant. Judgment dismissing the action was confirmed, the Court holding that there was no proof of fraud on the part of the landlord.

LIONAIS, *ex qual.* & WARD.—Judgment for respondent on a note confirmed.

STEWART & EVANS.—Judgment reducing the bill of appellant, an assignee, for services as receiver of an insolvent estate, from \$467.73 to \$120, was confirmed.

FARMER & DEVLIN *et al.*—Judgment dismissing an action by Farmer to rescind sale of real estate by O'Neil, one of the respondents, to Devlin, was confirmed. O'Neil had previously sold the property to Farmer, but the Court found no proof of collusion on the part of Devlin.

LAVIGNE & VILLARS.—Judgment awarding Villars \$132 as the price of six sewing machines sold to Lavigne, was confirmed.

PARKER & LATOUR.—Judgment, awarding respondent \$50 damages for gravel carried away by appellant from the beach close to respondent's house, was confirmed.

THE ST. LAWRENCE SALMON FISHING COMPANY & MCKAY.—Judgment condemning appellants to pay respondent a balance of \$444.44, in accordance with the report of Mr. Archibald McGowan, accountant named by the Court, was confirmed.

Montreal, Dec. 21, 1877.

Present:—Chief Justice DORION, Justices MONK, RAMSAY, TESSIER, and CROSS.

GRAFFTIN and SLEEPER.

Division in insolvency—Appeal therefrom—38 Vict., c. 16, s. 128.

Held, that the term of eight days, within which, under Section 128 of the Insolvent Act of 1875, proceedings in appeal or revision must be prosecuted, applies to judgments in Review as well as to those of the Court of first instance.

Appeal dismissed.

SIMPSON et al. (defts. below), Appellants; and *YOUNG et al.* (plffs. below), Respondents.

Action—Revendication—Sale by Collector of Customs.—31 Vic. c. 6, ss. 13 & 14.

A collector of Customs, by error, sold by public auction for unpaid duties, goods which had never been taken to the examining warehouse, or kept therein a month, as required by 31 Vic. c. 6, ss. 13 & 14, but had been warehoused by the harbor master for unpaid harbor dues. *Held,* that the sale was a nullity, and action of revendication by the purchasers was dismissed.

The respondents by an action of revendication, claimed 172 crates of bottles and flasks under the following circumstances. The goods came out to Montreal, and were placed on the wharf, but the harbor dues not being paid, the harbor master had the crates taken away and put in a warehouse until the dues should be paid. The Collector of Customs, supposing that they had been sent to the Customs' examining warehouse, caused them to be advertised and sold at auction, in the ordinary course, as goods on which the customs duties had not been paid. Meanwhile the agent of the consignors paid the harbor dues, and the goods were left in the warehouse subject to his order. The customs duties were not paid at the time of the sale. The purchasers at the auction sale brought an action of revendication, claiming the goods as their property. The Superior Court declared the *saisie revendication* good and valid, and ordered the defendants (the collector Simpson, and the warehouseman Morin) to give up the property, or pay \$2,000 for the value thereof.

In appeal this judgment was reversed by the majority of the Court, (Dorion, C. J., Tessier and Cross, J. J.). The sale by the Collector of Customs was held a nullity, the goods never having been in his possession, and not having been kept for a month in the examining warehouse, as required by 31 Vic. c. 6, ss. 13 & 14. The minority of the Court, (Monk and Ramsay, J. J.) considered that the sale took place under the circumstances contemplated by the law, and that the fact that the goods were not actually in the examining warehouse during the month previous to the sale made no difference.

Judgment reversed.

Geoffrion, for Appellant Simpson.

Durand, for Appellant Morin.

Doutre & Co., for Respondents.

COURT OF QUEEN'S BENCH. — APPEAL SIDE.

Quebec, Dec. 7th, 1877.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, J. J.

O'FARRELL, Appellant; and BRASSARD, Respondent.

Powers of Council of the Bar—Unprofessional Conduct—Writ of Prohibition.

Held, that a writ of prohibition will lie to restrain the proceedings of the Council of a section of the Bar.

The appellant, an attorney and advocate practising in the District of Quebec, was proceeded against before the Council of the Section of the Bar for the said District on the following accusations:

"1. D'avoir le dit John O'Farrell, le ou vers le 26me jour de Mai dernier, été nommé et assermenté comme constable à St. Etienne de la Malbaie, laquelle charge il accepta volontairement, dans une poursuite où lui, le dit John O'Farrell, agissait pour le plaignant, en sa qualité d'avocat et de procureur, cumulant ainsi dans la même poursuite les fonctions d'avocat et de constable, et d'avoir dans la nuit du vingt-six ou vingt-sept Mai aussi dernier, accompagné d'une douzaine d'hommes, arrêté comme constable susdit, en la paroisse de Ste. Agnes, un nommé Joseph Guay, cultivateur, du dit lieu."

"2. D'avoir le dit John O'Farrell, dans la nuit du vingt-deux au vingt-trois Juin dernier, accompagné l'huissier chargé d'arrêter un nommé Alexandre Murray dit Brunoché, cultivateur, de Ste. Agnes, et d'avoir assisté et aidé à faire la dite arrestation."

The Council of the Section found these charges proved, and that they were infractions of discipline and derogatory to the honor of the bar, and to the dignity and duties of the profession of an advocate, and condemned the appellant to suspension for two months, on the first charge, and one month on the second, and to pay to the respondent Brassard \$400.46 costs. The appellant obtained a writ of prohibition, which was set aside in review, (3 Q. R. p. 53). The Court reversed the judgment in Review, holding that the charges in the absence of any By-law, did not disclose any offence. (*Ante* p. 25.)

Judgment reversed.

THE ST. LAWRENCE STEAM NAVIGATION Co., Appellant; and BORLASE, Respondent.

Carrier—Negligence.

Held, that a steamboat company carrying passengers is liable for an accident occurring on the wharf where passengers are landed, to one of its passengers, owing to want of due precaution in not placing lights at night to show where there is danger from a slip constructed in the wharf, and down which the respondent fell, and was seriously injured.

Judgment of Superior Court confirmed.

LAFIERRE, Appellant; and GAGNON, Respondent.

Capias—Waiver of claim to damages.

Held, (reversing the judgment of the Superior Court.) that where a *capias* was taken out under circumstances which might justify a suspicion of unfair dealing, but without sufficient probable cause to justify the issue of the writ, and where the parties, on the matter being explained, settled about the payment of the debt without any reserve, and the defendant is at once released without ever having been taken to gaol, the Court will readily presume that the defendant waived any claim for damages.

Judgment reversed.

BENOIT, Appellant; and PETITCLERC, Respondent.

Capias by vendor—Dissipation of moveables.

Held, that a vendor with his *baillieur de fonds* claim duly enregistered may maintain a *capias* against his debtor, who is dissipating his moveables, without proving in any way that the property hypothecated has depreciated in value so as to render his debt more precarious than at the time of sale.

Judgment of Superior Court confirmed.

NOTE.—Ramsay, J., was not present at the rendering of this judgment, and did not join in it.

MCGRENNY, Appellant; and VANASSE, Respondent.

Evidence.

Action by respondent to recover first instalment of \$3000, on obligation to pay \$18,000, as being a claim against the North Shore Railroad Company, of which railway appellant was contractor. The respondent was to obtain a resolution from the directors of the Company acknowledging the debt. By his action he averred that the appellant had rendered it impossible for him to obtain this resolution, inasmuch as he abandoned his contract with the Company, which had ceased to exist, the Provincial Government having assumed the line and made a new contract with appellant, by which the latter was to pay all the debts of the extinguished Company. *Held*, (reversing the judgment of the Superior Court) that without proof of the existence of the debt, respondent could not recover.

Judgment reversed.

RICHARD, Appellant; and WURTELE, Respondent.

Capias—Alias Writ.

On the 5th December, 1876, the appellant was arrested on a *capias* issued on the 2nd December, and returnable on the 14th December. Finding that through the delay to execute the writ, a sufficient delay for the return was not allowed, the plaintiff took out an *alias* writ, returnable on the 18th of December. *Held*, (confirming the judgment of the Court below, rejecting the exception *à la forme* filed by the appellant) that the proceeding was valid. Judgment confirmed.

DUMAS et al., appellants; and WUTZELS et al., respondents.

Injunction—Merchants' Shipping Act.

Held, an injunction will lie under the Merchant Shipping Act of 1854 (Imp.), sect. 65, with regard to a ship to be built or about to be built, unregistered under the provisions of the Act of the Parliament of Canada, 35 Vict. c. 128, s. 36.

Judgment of Superior Court confirmed.

GRUBBS, Appellant; and POTHIER, Respondent.

Promissory Note.

Action on a promissory note. Pending suit the note was returned to the drawer, as plaintiff pretended, by mistake for another note of smaller amount, the subject of another suit. The Superior Court maintained plaintiff's pretensions, and this judgment was confirmed in appeal, Ramsay, J., dissenting.

Judgment confirmed.

(In the following cases, heard at Quebec, judgment was rendered at Montreal, Dec. 22.)

CONNOLLY, Appellant; and THE PROVINCIAL INSURANCE COMPANY, Respondents.

Warranty, compliance with—"To go out in tow."

Held, (reversing the judgment of the Court of Review, Quebec,) that the warranty "to go out in tow" in a policy of insurance, without its being specified how far, is complied with by the towing of the vessel out from the wharf where she was lying, the expression not being technical and having no special meaning by usage in the port of Quebec. (Cross, J., diss.)

Judgment reversed.

MOISAN, Appellant; and ROCHE, Respondent.

Held, (reversing the judgment of the Court of Review, Meredith C. J., diss.) that revindication will lie by a judicial guardian to recover possession of property placed in his charge.

THURMER, J., diss., thought the action did not lie.

CROSS, J., diss., thought the action would lie if the guardian had ever been in possession.

Judgment reversed.

CURRENT EVENTS.

GREAT BRITAIN.

DELAYS OF BUSINESS.—The re-organization of the judicial system in England has not facilitated the dispatch of business. Complaints

of the law's delays are very numerous in the daily press, and the *Times* of January 2, reviewing the business of the last two years, has the following:

"The condition of the law lists at the close of the last sittings proves only too clearly that the evils of delay which have been so often complained of during the past year are not of any accidental or passing nature. An account which we publish in another column shows that when the sittings commenced there were 500 causes for trial in London, and of these, with new causes entered, there remained nearly 300 standing over when the holidays commenced. In Middlesex the sittings began with a list of 860; they end with a list of 723 awaiting the labors of the new year, and these latter figures are the more remarkable as nearly 200 of the original 860 were withdrawn when the time of trial approached. In fact, less than 200 were actually tried, and of those standing over for trial at this moment 683 are now, as far as the process of the Courts is concerned, ready for trial, but, judging by the rate of progress made last sittings, should these cases prove even as substantial as the 860 standing for trial in November, they cannot be got through before the commencement of the next Assizes. The remainder of them would then stand over, along with all the causes which may come into existence in the meantime, until the sittings at Easter. Such a state of things produces manifold evils which cannot be long tolerated by the public. The suitor coming in good faith to seek the assistance of the Courts is denied justice until his patience or resources are exhausted. In questions of commercial business, which make the main portion of civil causes, time is often the most important consideration, and the fact that the suitor may have to wait six months or a year before he can have the facts of the simple question of contract on which he relies affirmed by a jury is a direct premium on fraud. There is not only the loss of precious time; there is the danger of evidence passing away, of the death of witnesses, or, if the suitor be able to escape these more serious perils, there is the cost or inconvenience to himself or to his witnesses of securing their attendance after a long interval of time. In great commercial cases an important witness may be here to-day and in New York next month. With a case pending among seven or eight hundred others it is impossible to say with any certainty when the witness's evidence will be required. It is true a Commission may be issued to take evidence in a particular foreign country; but a Commission is an enormous addition to the cost, and the witness may be moving about. But for the witnesses having engagements in different parts of the kingdom there is not even the resource of a Commission, and business arrangements in Liverpool and Glasgow must be made continually subject to disturbance by the

uncertain operation of the Law Courts. Whatever explanation may be given of this delay, one obvious result is to aggravate the mischief of fictitious defences. A just claim is resisted because the wrong-doer knows that by resistance he can at least gain a considerable time, and this may be everything to him. At least it will give him a chance of negotiating and of worrying his adversary into a compromise.

"We have already referred to the large number of cases standing for trial and settled at the last moment. Most of these cases, probably, are simply the efforts of defendants to put off, as long as possible, the necessity of satisfying claims they cannot deny. On the other hand, some of these surrenders arise from the incapacity of the plaintiff to produce any evidence in support of his allegations, and prove even more strongly than the fictitious defences the hardship of delay. Speculative actions are among the worst abuses which can attend a judicial system. It is inevitable that there shall be found a certain number of persons ready to get up cases without much inquiry as to the good faith of the proceedings, trusting to the chances of a compromise to secure some amount of costs if a verdict should prove to be out of the question. The proportion of these speculative cases has been very much diminished by the modern County Court system, but still they exist, and however great a reproach such a class of practitioners may be to the law, they cannot be actually suppressed. Sometimes, indeed, a penniless man with a real substantial grievance makes use of them to bring his case before the Courts. Unable himself to offer security for costs, without connexions to support his assertions, such a suitor would have no attraction for the prosperous, respectable solicitor, whose time would be too well employed for him to enter into the case. His only chance is the speculative enterprise of the more doubtful section of the profession. The possibility of such cases makes it difficult to get rid of such a class, but when, as generally happens, the clients in such cases are unprincipled speculators, it is a very great hardship that if the defendant refuses to become their victim and to compromise, the crisis of his struggle with extortion should be prolonged to one sittings after another before he is able to rest in peace with the knowledge that his assailant has given up the battle and is out of Court. These long delays are a temptation not only to the tricky defendant, but to the speculative plaintiff, and no legal system that is subject to them can be satisfactory to the public, however excellent the laws, and however distinguished the Judges who apply them.

"One of the reasons of this accumulation of business is suggested to be the greater number of cases tried by juries under the provisions of the Judicature Act, with the lengthy examination of witnesses in open court. How far an unlimited power of demanding a jury should be left to suitors in civil cases may be a question.

On the one hand there is very much to be said for the theory that the judgment of a man guided by the aid of counsel and by a long experience of judicial inquiry would give, in the majority of cases, results more satisfactory to the public than the verdicts of juries now supply, and there is an obvious saving of time, not only to the suitors in the greater precision with which the Judge is able to deal with the case, but also to the class from which jurors are drawn. On the other hand, the power to call for oral evidence with the right of cross-examination in many cases that would formerly have been dealt with on affidavit, though a cause of increased delay, is beyond question an advantage to the public. Time may be wasted by an abuse or an incompetent use of the power of cross-examination, and Judges may be sometimes found who lose themselves in a mass of details rather than confine counsel to the matter in hand; but these evils would arise just as often under a system of affidavits with speculative deductions. The more direct production of evidence is a reform of which we must not forget the value, though it may be one of the many causes contributing to the great mischief—the length of our law proceedings. That a remedy for that mischief is urgently needed is only too clear, but to find this remedy we should look rather to a re-arrangement of existing machinery than to any upsetting of the general principles on which the Judicature Acts are founded. Those acts introduced changes of such magnitude that their full operation cannot be immediately determined. A frank recognition of the inconveniences which arise is the first condition of improvement, and the figures given as to the last sittings will make it impossible for the most tranquil optimist to deny the evil of which we complain. The principle of reducing the number of Judges sitting *in Banc* might be applied more thoroughly than it has yet been. A fusion of certain jurisdictions still reserved to special divisions of the High Court is another expedient which might add to the judicial power. Though in theory all the Judges of the High Court have equal powers, very large exceptions are made in favor of special kinds of work formerly assigned to those Courts which exist now not as separate Courts, but as divisions of the High Court. These reservations, as of Crown business for the Queen's Bench Division, are just those which, however wise and necessary at the introduction of so great an administrative revolution, may be curtailed as the new system comes into more general working. One of the great requirements of the public to meet which the Judicature Acts were passed was to secure the speedy despatch of legal business. If the result continues to be that while great improvements in principle and method have been secured, the mass of suitors are exposed to additional delays, further changes will be insisted on; but they will be modifications, how-

ever large, of machinery, not an abandonment without longer trial of the principles embodied in the Judicature Acts."

ONTARIO.

It has been rumored that the honor of knighthood was about to be conferred on Chief Justice Moss, of the Court of Error and Appeal of Ontario. The rumor may be due to the fact that the Judge occupying a similar position in the Province of Quebec has been knighted. But there were obvious reasons for the conferring of the distinction in the latter case which do not apply to the newly appointed Chief Justice of Ontario. The report, at all events, seems to have been premature.

FIRE INSURANCE.—In the case of *Benson v The Ottawa Agricultural Insurance Co.*, it was held by the Court of Queen's Bench, Ontario where a policy provided if any misrepresentation or concealment of facts was made in the application, the policy should be void, that the omission to state that the premises were situate near and opposite to a blacksmith's shop, was immaterial, and there was no concealment.

UNITED STATES.

BUSINESS BEFORE THE SUPREME COURT.—It appears that as in England so in the United States, there is considerable accumulation of business before the higher tribunals. Senator Davis, late a Judge of the Supreme Court, has in contemplation, it is said, a bill looking to the increase of the number of circuit judges, and the establishment of a sort of appellate court in each circuit, with jurisdiction in all cases [involving] an amount not exceeding \$10,000. In an interview with a correspondent of the *N. Y. Times*, Judge Davis said:—"There are now nine Circuit Judges. I propose to increase the Judges to eighteen. It is a popular mistake to think the increase of the number of Judges of the Supreme Bench would expedite matters. It would rather retard them. The only way in which the Supreme Court could expedite matters, would be to have it divided up into sections, one taking this and another that branch of jurisprudence, the decision of each section to be final on the matters submitted to it. An attempt to do this would give rise to the grave constitutional question, whether litigants coming before the Supreme

Court of the land are not entitled to the individual judgment of each member of the Bench. I am rather inclined to the opinion that the objection would be well founded."

RECENT ENGLISH DECISIONS.

Company.—In the articles of a company, it was provided that no person should be qualified for director who was not the holder of fifty shares. The board of directors afterwards undertook to elect H. a director, though he had no stock. He attended two meetings and then resigned. In the winding up it was attempted to make him a contributory to the extent of fifty shares. *Held*, that he could not be made a contributory, and that his election was void.—*In re Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Co.*, 5 Ch. D. 705.

Contract.—The defendants by the contract agreed to buy from the plaintiffs 600 tons of rice, to be "shipped" at Madras, in the months of March or April, 1874. 7,120 bags of rice were put on board between the 23rd and 25th of February, and three bills of lading therefor were signed in February. Of the remaining 1,080 bags, 1,030 were put on board February 28, and the rest March 3; and the bill of lading for the 1,080 bags bore the latter date. There was evidence that rice put on board in February was as good as that put on board in March or April. *Held*, that the contract had not been complied with, and the defendants were not bound to accept the rice.—*Bowes v. Shand*, 2 App. Cas. 455.

Evidence.—*Life Insurance.*—On the 16th April, 1874, the respondent brought an action against the appellants on a policy of insurance of one N., dated 28th September, 1863. N. disappeared in May, 1867, and a sister and brother-in-law testified that none of his family had heard anything of him since that time, but his niece said she had seen him in December, 1872, or January, 1873, when she was standing in a crowded street in Melbourne; that she started or turned to speak to him, but before she could do so he was lost in the crowd. She had told this circumstance to N's. other relations. The jury informed the court that they did not consider this evidence conclusive that she had seen N. Counsel for plaintiff asked the court to instruct

the jury "that there was evidence that N. had been absent seven years without being heard of, and that he had not been heard of, if the niece was mistaken in believing that she had seen him; and if the jury thought she was mistaken, then N. might be presumed dead, having been absent more than seven years without being heard of." This was refused, and the court instructed the jury, *inter alia*, as follows: "You cannot say that a man has never been heard of, when in the first place one of his nearest relations says she saw him within two years; still less when every member of the family states that they heard so. You cannot have any one called who saw him die or saw him buried. You have, therefore, no direct evidence except that he was alive three years ago. You have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of his relatives heard that he was alive." The court added that the presumption of death was removed by the most positive evidence, and finally: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendant." *Held*, by the Court of Appeal a misdirection, and on appeal to the House of Lords the Lords were divided, and the holding of the Court of Appeal remained undisturbed.—*Prudential Insurance Co., v. Edmonds*, 2 App. Cas. 487.

Executors and Administrators.—Bequest of personal property to executors to divide it equally among four persons. Part of the property was at testator's death in three second mortgage bonds of the Atlantic and Great Western Railway Company of America, of uncertain value and rapidly falling. At that time they were worth £153 each. They rapidly fell until fifteen months afterwards two of them were sold for £53 each, and the one remaining unsold was worth at the time of the suit £20. One of the legatees had urged the executors to dispose of the bonds earlier, but the executors said they held them in the honest expectation that they would rise. *Held*, that the executors could not

be required to make good the loss.—*Marsden v. Kent*, 5 Ch. D. 598.

False Pretences.—Case stated on the conviction of one C. for falsely pretending that he was a responsible dealer in potatoes, and had credit as such, whereby one G. was induced to forward him large quantities of potatoes. The evidence consisted of the following letter from C. to G: "Sir,—Please send me one truck regents and one rocks as samples, at your prices named in your letter. Let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. P.S.—I may say if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on." *Held*, that the conviction was correct.—*The Queen v. Cooper*, 2 Q. B. D. 510.

RECENT UNITED STATES DECISIONS.

Agent.—A promissory note was made to J. S., cashier, or order. *Held*, that the bank of which he was cashier might sue on the note in its own name, without an indorsement by him.—*Garton v. Union Bank*, 34 Mich. 279.

2. The owner of property offered to pay a broker a certain sum for selling it. The broker procured parties to treat for the purchase, and the owner gave them time to consider his terms, but before the time was out sold the property to a third party. *Held*, that the broker was entitled to recover the agreed compensation.—*Reed v. Reed*, 82 Penn. St. 420.

Animal.—1. Action to recover for the killing of plaintiff's dog by defendant's dog. *Held*, no defence that plaintiff's dog was unlicensed, and might, therefore, by statute, be killed by "any person;" defendant's dog not being a "person."—*Heisrodt v. Hackett*, 34 Mich. 283.

2. In an action to recover for injuries suffered by the bite of defendant's dog, the plaintiff may recover on proof that the dog was vicious, and that defendant knew it, without showing that he had ever before bitten any one.—*Rider v. White*, 65 N. Y. 54.

Arson.—A servant who sets fire to his master's house, by his master's procurement, for the purpose of defrauding the insurers, is not guilty of arson.—*State v. Haynes*, 66 Me. 307.

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THE LIABILITY OF TELEGRAPH COMPANIES.

An illustration of the difficulty which sometimes occurs in applying the old and well established principles of law to the complications of modern business, is afforded by the case of *Dickson v. Reuter's Telegraph Co.*, which recently came before the Common Pleas Division in England, whose judgment has been affirmed by the Court of Appeal. Some of the Judges of English and American Courts seem to have been puzzled as to the light in which telegraph companies should be regarded. Should they be treated as common carriers, and bound by the strict rules applicable to common carriers? That is the view which has been adopted by certain Courts in the United States. Are they merely bailees for reward, liable only for gross negligence to the sender or sendee of the message? That is a modification of the common carrier doctrine, which has been preferred by other American Judges. But the English Courts have accepted neither definition. They exempt telegraph companies from any responsibility not arising directly from contract, and under this rule the Common Pleas Division have rejected the claim of *Dickson & Co.* against the Reuter's Telegraph Company, though it must be acknowledged that the plaintiffs had suffered a serious injury through a mistake made by the defendants.

It was a case of a telegram being delivered to the wrong party, but neither the sender of the message nor the person to whom it should have been delivered complained of this, but the actual recipient who, assuming that the message was intended for him, took action thereon which involved him in heavy loss. The facts were these. The plaintiffs were merchants at Valparaiso, being a branch of a firm carrying on business under a different style at Liverpool. The telegraph company, defendants, had its chief office in London, with agencies at Liverpool and elsewhere, but not at

Valparaiso. They had a system, however, of forwarding the messages of several senders in what is termed a "packed telegram," each message being distinguished by a cipher known to the defendants and their agents, and to the senders. On receipt of the "packed telegrams" by the defendants' agents, the several messages were transmitted to their proper recipients. In December, 1874, the plaintiffs at Valparaiso received a message transmitted by the defendants from Monte Video (where they had an agency), purporting to be an order, from the plaintiffs' Liverpool house, for a large quantity of barley. No such message was, in fact, sent by the Liverpool firm, nor was the message intended for the plaintiffs; but the latter, believing the message to have been duly sent, proceeded to execute the order. The misdelivery of the message was caused by the negligence of an agent of the defendants, and resulted in a serious loss to the plaintiffs, the price of barley having fallen in the market.

It was under these circumstances that the plaintiffs, having undoubtedly been wronged, cast about for a remedy. They could not sue the sender of the message, because he never intended that the plaintiffs should get it, and he could not be held liable, unless the telegraph company could be considered his agents—like a clerk carrying a verbal message for his employer—a view which does not seem to have been entertained anywhere. The plaintiffs, therefore, not being able to sue the sender, tried to make the telegraph company responsible for the consequences of the blunder. The liability of the company was sought to be established on three distinct grounds: First, because they had made to the plaintiffs a statement false to their knowledge, or rather false in this respect, that they might have acquainted themselves with the fact that it was untrue. Second, it was contended that the defendants were liable, upon a suggested analogy between this case and that of *Collen v. Wright*, 7 E. & B. 301, in which the rule was laid down, that a person professing to contract for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. And the third and last contention of the plain-

tiffs was that the telegraph company, by the very extent and nature of their business, owe an obligation to the recipient as well as to the sender, and that it is an essential part of their business to be accurate in the delivery of their dispatches.

These three points were severally overruled by the judgment of the Common Pleas Division, since affirmed by the Court of Appeal;—the first on the ground that it is essential that the statement should be false to the defendants' knowledge to make them responsible. In the present case the company were a mere medium for the transmission of messages, and did not hold themselves out as agents of the senders.

The second ground was one of more subtlety. The defendants, it was argued, being the agents of the senders, by their telegram proposed to the plaintiffs to enter into a certain contract. That, it turned out, they had no authority to do; but it was contended that they must be taken to have warranted that they had such authority. The answer to this was that the telegraph company did not hold themselves out as agents of any one, nor did they profess to carry on the business of agents for making contracts. And further, there was no contract express or implied. "Here there is no duty cast by contract," remarked Lord Justice Bramwell, "because there is none; and none by law, for if there were, then the words of the general principle—that no action is maintainable for any statement which causes damage to the person to whom it is made, unless it be fraudulent—would have to be amended by adding to the word 'fraudulent' the words 'or careless'; but no such addition exists."

The third point—the obligation of the telegraph company from the nature of their business to be accurate in the delivery of their messages—was somewhat summarily overruled by the Common Pleas Division. "The proposition," it was remarked in the judgment, "is simply equivalent to this contention, that a telegraph company, having no contract with any individual except the sender, must be supposed to guarantee, towards all mankind, the accuracy and care of all their servants in all parts of the globe wherever they deliver a message, to such an extent at least as that if, through the negligence of any of their servants at any stage of the transmission, a message

should be sent to the wrong person, that person, if he acted upon it to his detriment, would have an action."

This, we must assume, is good law; but we remain under the impression that the case of Mr. Dickson is one of great hardship. By no fault of his own, or of the senders of the message, he incurred a loss of \$7,000. Has he no remedy? Are telegraph companies to be exempted from liability for the consequences of their blunders? An English legal contemporary remarks: "The Court of Appeal saw nothing unreasonable in the present state of things; and though the case was one of much hardship for the plaintiffs, yet, considering the heavy and burdensome results to telegraph companies which would follow from such an obligation, we are certainly inclined to adopt that view of the matter." This strikes us as rather a poor argument. If telegraph companies were held liable, as they might be by Statute, for mistakes, they would simply have to be more careful, or to charge a little more for messages as a sort of insurance to cover losses by mistakes. The business would only be a little more hazardous. There would be less hardship in making companies bear the consequences of an occasional blunder than in visiting them upon private individuals who have no way of protecting or insuring themselves. It may be remarked that the law of libel affords an illustration of a much more stringent rule. The publishers of a newspaper are held liable for a mere error, where the faintest suspicion of malice is absent; as in the recent case of *Larin v. White*, decided by the Superior Court at Montreal. Here two persons, each bearing the Christian name of "Charles," were charged with offences before the Recorder, and a newspaper reporter, by error, imputed the more serious offence to the wrong Charles. The publishers, being sued for libel, were condemned in damages, though the error was amply corrected at the earliest moment possible, and no special damages were alleged or proved. See also *Starnes v. Kinnear*, 6 L.C.R. 410, where damages were awarded against newspaper proprietors for inserting an advertisement, received in good faith, but which turned out to be untrue. Surely mistakes of this kind are equally or more difficult to guard against than an error in the delivery of a telegraphic message.

JUDGES' NOTES IN PRIVY COUNCIL CASES.

It is generally known that in cases appealed to the Privy Council, the Judges of the Colonial Court are required to transmit to England the reasons stated by them for or against the judgment appealed from. The Rule of Practice by which this is prescribed was made by the Judicial Committee of the Privy Council on the 12th February, 1845, in pursuance of the provisions of the Imperial Statute, 7 & 8 Vict., cap. 43, sec. 11. This Rule, of which we give a copy below, was transmitted to the Chief Justice of Montreal, under direction of the Governor General, by letter from J. M. Higginson, dated Civil Secretary's Office, Montreal, 29th April, 1845. We have heard it stated that Judges who dissent are not required to put their opinions in writing for transmission to the Privy Council; but the Rule quoted below negatives this, and we are not aware of the existence of a later rule. The order is as follows:—

"AT THE COUNCIL CHAMBER,

Whitehall, the 12th of February, 1845.

"By the Judicial Committee of the Privy Council.

"Whereas by an Act passed in the 8th year of Her Majesty's reign, intituled: 'An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled: 'An Act for the better administration of Justice in Her Majesty's Privy Council, and to extend its jurisdiction and powers,' it was enacted that it should be lawful for the Judicial Committee of the Privy Council to make any general Rule or Regulation to be binding on all Courts in the Colonies and other Foreign Settlements of the Crown, requiring the Judges' notes of the evidence taken before such Court on any cause appealed, and of the reasons given by the Judges of such Court, or by any of them, for or against the judgment pronounced by such Court, which notes of evidence and reasons should by such Court be transmitted to the Clerk of the Privy Council within one calendar month next after the leave given by such Court to prosecute any appeal to Her Majesty in Her Privy Council, and such order of the said Committee should be binding upon all Judges of such Courts in the Colonies or Foreign Settlements of the Crown. Now therefore the Lords of the said Judicial Com-

mittee of the Privy Council are pleased to order, as it is hereby ordered, that when any appeal shall be prosecuted from any judgment of any Court in the Colonies or Foreign Settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges for or against such judgment, should be by the Judge or Judges of such Court communicated in writing to the Registrar of such Court or other Officer whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by them transmitted in original to the Clerk of Her Majesty's Privy Council at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the appeal are transmitted.

"Whereof the Judges of all such Courts in the Colonies or Foreign Settlements of the Crown are to take notice and govern themselves accordingly.

(Signed,)

"GREVILLE."

THE LEGAL NEWS.

The success of **THE LEGAL NEWS** in the first month of publication has been most gratifying, and encourages us to believe that it will continue to progress in public estimation and fill a permanent place in the literature of the country. We are unable to thank individually the many friends who have kindly expressed their appreciation of the **LEGAL NEWS**, and good wishes for its prosperity. We desire to do so collectively, and we would take the opportunity of remarking that the interest of a work of this character may be greatly increased by contributions from the various Provinces in which it circulates. We hope that the members of the profession and others who receive the journal will bear this in mind, and send us, from time to time, notes of such matters as they deem worthy of record.

REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, December 21, 1877.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and CROSS.

LAPIERRE (plff. below). Appellant; and

L'UNION ST. JOSEPH DE MONTREAL (defts. below), Respondents.

Benefit Society—Expulsion of Member—Mandamus.

Held, that a member of an incorporated benefit society is entitled to due notice before he can be expelled for non-payment of dues; and where a member is expelled without notice a writ of mandamus will issue to restore the expelled member, subject to payment by him of arrears due.

The appellant had been expelled from membership in L'Union St Joseph, an incorporated benefit society, for being in default to pay six months' contributions. The question was whether the member was entitled to notice. The by-law of the society did not provide for notice, the rule applicable to the case being as follows: "When a member neglects for six months to pay his contributions, or the entire amount of his entrance, the society may strike his name from the list of members; thereupon he no longer forms part of the Association. To that end at each regular general meeting, the collectors-treasurers are bound to make known the names of those thus indebted for six months' contributions or for a balance of their entrance fee; and thereupon any member may make a motion that such members be struck from the list of the society's members."

The Superior Court having held notice to be unnecessary, and the expulsion to be legal, the plaintiff appealed.

CROSS, J., for the majority of the Court, pointed out that the rule was not so framed that default of payment for a specified time of itself operated a forfeiture of the rights of membership. In England, prior notice is matter of right; *Rez v. Richardson*, 1 Burrows' Rep. 517; *Rez v. Mayor of Liverpool*, 2 Burrows' Rep. 734. The same rule had been applied in the United States; 2 Serg. & Rawle, 141. The safest rule, and the one justified by precedents, was to hold that notice is necessary.

Judgment reversed.

Doutre, Doutre, Robidoux, Hutchinson & Walker, for Appellant.

Mousseau, Chapleau & Archambault, for Respondent.

BEAUCHERMIN *et al.* (defts. below), Appellants; and SIMON (plff. below), Respondent.

Master and Servant—Unjustifiable Discharge—Action for Wages.

Held, that a servant, discharged without sufficient

cause before the expiration of his term of hire, cannot, if he sues for wages, claim for more than the portion of the term which has expired at the date of the institution of the action; but, *semble*, he may bring an action of damages for breach of contract, and then the length of the unexpired portion of the term may be taken into consideration in estimating the damages.

Simon, the respondent, was engaged as a skilled workman, and not giving satisfaction to his employers, the appellants, was discharged. He brought an action at once for his wages for the whole term of hire, only a small portion of which had expired. The Superior Court dismissed the action on the ground that the plaintiff's discharge was justifiable, but in Review this decision was reversed. Mondelet, J., dissenting; and judgment went for the plaintiff for the wages of the whole term. The defendants having appealed,

DORION, C. J., for the majority of the Court, considered that the judgment must be reformed. The respondent had sued for his wages for the whole term, but he had not made any proof of damages, except the fact that he was discharged. Under the circumstances he was only entitled to \$30.40 for the portion of the term which had expired at the date of the institution of the suit. He could not claim to be paid in advance wages which were not due. But his recourse would be reserved for any further claim which he might be able to establish.

MONK, J., concurring, remarked: I think the rule is settled that where a man claims wages, if he sues for wages he makes wages the measure of his damages, and he must wait until the wages are due. Here the action was brought for wages, and the plaintiff was only entitled to the \$30.40 actually due. A variety of reasons may be assigned why he should not recover wages in anticipation. He may die before the term has expired, or in some other way the wages may never become due. If he wishes to recover more than is due, he must allege that he has suffered damage through the breach of contract, and must proceed to prove positively that the amount of damage claimed has been suffered. The distinction is perfectly plain. In the latter case the servant has to show that he tendered his services, and he must also show as a matter of fact that he could not get other employment.

RAMSAY, J., dissenting, considered that a servant unjustifiably discharged may claim his

wages in advance. If the period had elapsed there was very little doubt he might have brought his action for wages as well as for damages: he might have laid his action for damages measured by wages. It was so decided by this Court in *Rice & Boscovitz*. If, then, a man may recover his exact wages as the measure of his damages, why may he not allege that he could not find any other work, and bring his action for the whole term at once? It would be hard to make a man bring an action once a week as the wages accrued.

The judgment was reversed with costs against respondent, "considering that the respondent could not so claim in advance wages which were not due, and which could be the price only of respondent's services, and that under these circumstances the respondent was entitled only to the wages due and accrued when he instituted his action," &c.

Judgment reformed.

Barthe, Mousseau & Brassard for Appellants.
Gauthier & St. Pierre for Respondent.

VOMARD (deflt. below), Appellant; and **SAUNDERS** (plff. below), Respondent.

Lease, action to resiliate—Court—Jurisdiction.

Held, that an action to resiliate a lease, where arrears of rent or damages are also claimed, must be brought in the Superior or Circuit Court according as the amount of rent or damages claimed is within the jurisdiction of the Superior or Circuit Court.

The respondent sued in the Superior Court for \$60, viz., \$27 for assessments, and \$33 for arrears of rent, and he also prayed for the resiliation of the lease. A declinatory exception pleaded by the appellant was rejected. In appeal,

DORION, C. J., considered that the exception should have been maintained. It was no doubt a difficult question, and the decisions had been contradictory, but the interpretation which the majority of the Court put upon the Code and Statute was that where a claim for damages or rent is joined with a demand for the resiliation of the lease, the jurisdiction is determined by the amount of rent or damages claimed, irrespective of the annual value or rent of the premises leased.

TESSIER, J., dissenting, thought that if the rent or annual value was over \$200, the action to rescind the lease might properly be brought

in the Superior Court, though the amount of rent due or damages claimed by the action might be less than \$200. If the action was brought simply to resiliate, the plaintiff was clearly entitled to go to the Superior Court; why then, because he asked something more than the rescission of the lease, should he be compelled to go to the Circuit Court?

MONK, J., also dissenting, did not see how the Circuit Court could resiliate a lease where the annual rent was perhaps a thousand dollars or more, simply because the plaintiff, in addition to the demand for resiliation, asked something which by itself would have come under the jurisdiction of the Circuit Court.

Judgment: "Considering that under Arts. 887 and 1105 C.P.C., actions to rescind a lease must be brought in the Superior or Circuit Court, according as the amount of rent or damages claimed is within the jurisdiction of the Superior or Circuit Court," &c.

Judgment reversed.

Forget & Roy, for the Appellant.

Loranger, Loranger & Pelletier, for the Respondent.

Montreal, Dec. 22, 1877.

Present:—Chief Justice **DORION**, and Justices **MONK, RAMSAY, TESSIER** and **CROSS**.

THE QUEEN V. GLASS.

Embezzlement—General Deficiency.

Held, that a clerk in a bank may be convicted of embezzlement, on proof of a general deficiency supported by evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken.

On a Reserved Case from the Queen's Bench, Crown side,

RAMSAY, J., remarked that the Court had already decided in the case of *Glass* that a general deficiency would not support an indictment for larceny; nor would it support an indictment for embezzlement; but the Reserved Case did not turn on that. The question was whether an indictment for embezzlement could not be maintained unless it was proved that a particular sum, coming from a particular person on a particular occasion, was embezzled by the prisoner. There was no doubt here that the prisoner unlawfully appropriated money, and the jury had the whole matter before them.

DORION, C. J., concurring, pointed out the im-

possibility of bringing home to a bank clerk, who perhaps received money from a hundred people in the course of a day, the charge of embezzling any particular sum received from a particular person.

MONK, J., dissenting, thought that the evidence of a general deficiency was not sufficient to support the indictment.

Conviction affirmed.

T. W. Ritchie, Q. C., for the Crown.

Goodhue (Archibald with him) for the prisoner.

GILBERT (def. below), Appellant; and COINDET *vs qual.* (plff. below), Respondent.

Revendication by Judicial Guardian.

Held, that revendication will lie by a judicial guardian to recover possession of property placed in his charge, of which he has been dispossessed. (See *Moisan & Roche*, 1 Legal News, 33.)

The respondent, in his quality of *gardien d'office* in a cause pending in the Superior Court, took out a *saisie-revendication* of a certain steam-engine which had been placed in his charge, and which the appellant had removed by force. The question of law presented was similar to that decided on the same day in *Moisan & Roche* (1 Legal News, 33). The Superior Court (Mackay, J.) maintained the revendication by the guardian. In Appeal, this judgment was confirmed, Tessier, J., dissenting.

DORION, C. J., referred to C. C. 1825, which makes no distinction between a guardian and a sequestrator, and held that the same rule was applicable to both. The guardian was obliged to produce the effects placed in his charge, and if dispossessed of them he must have the right to follow them into whatever hands they had gone.

Judgment confirmed.

Joseph & Burroughs for Appellant.

S. Pagnuelo for Respondent.

MCCORKILL (opposant below), Appellant; and KNIGHT (plff. below), Respondent.

Opposition to seizure of real estate—Fraudulent title.

Held, that a person cannot oppose a seizure of real estate, though the opposition is based on possession, when the opposant's title appears to the Court to be manifestly fraudulent and simulated.

Real estate was seized as being in the possession of the vacant estate of McCorkill, de-

ceased. The appellant, his sister, opposed, setting up title and possession under title.

The respondent, representing a judgment against McCorkill's vacant estate, contested on the ground that the opposant's title was bad in law, and simulated and fraudulent, and that there was no possession on the part of the opposant.

The majority of the Court held that where title was bad in law, and simulated and fraudulent, and where the purchaser had suffered the vendor to act as proprietor, and to be the reputed possessor *animo domini*, she could not maintain an opposition founded on the pretention that the seizure on the curator to the vacant estate was *super non domino et non possidente*, though she had done some acts of possession and the property stood in the books of the municipality in her name. (632 C. P.)

MONK, J., diss., remarked that the Judge in the Court below had not set aside the deeds under which the opposant claimed. It was impossible to view them as an absolute nullity, as the Judge below had done. Moreover, deeds could not be set aside without bringing in the parties interested. The judgment, in his view of the case, should be reversed.

CROSS, J., also dissenting, thought the opposant had possession *animo domini*—such possession as would entitle her to prescribe, and she ought not as opposant to be put in the position of a plaintiff. She should be in the position of a defendant attacked by a revocatory action.

Judgment confirmed.

Doutre, Doutre, Robidoux, Hutchinson & Walker for Appellant.

A. & W. Robertson for Respondent.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Quebec, Dec. 7, 1877.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and CROSS.

DUPRESNE, Appellant; and DUBORD, Respondent.
Privilege—Hypothec—Donation.

A third party, in whose favor certain charges were established by deed of donation of real estate, brought a hypothecary action against the *déteneur* of the real estate, although there was no express clause in the deed

stipulating a hypothec on the immovable alienated. Arts. 2014 and 2044 C. C. The difficulty was that no legal or tacit hypothec exists, except in favor of married women, under Art. 2029 C.C., in favor of minors and interdicted persons under Art. 2030 C.C., and in favor of the Crown under Art. 2032 C.C.; and again, that such third party had no quality to sue.

In Appeal, the Court, confirming the judgment of the Court of Review (Stuart, J., *diss.*), and by which the judgment of the Superior Court was reversed, held that the action might be brought by the party benefited, and this although the deed did not by an express clause hypothecate the real estate thus given.

Judgment confirmed.

HEARN (deflt. below), Appellant; and MALONEY (plff. below), Respondent.

Exception à la forme—Misnomer.

The name of respondent was "Thomas J.," and not "Thomas," as in the writ and declaration. *Held*, confirming the judgment of the Court below, that this was not such a misnomer as to be ground for an exception *à la forme*.

NOTE.—Ramsay, J., was not present at the judgment, and did not join in it.

GARON, Appellant; and TREMBLAY, Respondent.

Sheriff's Sale—Mortgage Creditor—Opposition en sous ordre.

A purchased a lot of land at Sheriff's sale without paying the purchase money. He subsequently exchanged it with B, who agreed to give to the Sheriff the required security and to pay the mortgages. After security was given to the Sheriff, the property was irregularly sold *à la folle enchère* of A, and again resold by the Sheriff on the second purchaser. B then claimed the proceeds of this sale as the price of his property. C, a mortgage creditor anterior to the first Sheriff's sale, claimed the amount of his mortgage. His opposition was contested by B, and dismissed.

Held, reversing the judgment of the Superior Court, 1st, that as it did not appear that B had paid the mortgage of C, the latter had the right to be paid in preference to B the amount

of his mortgage on the monies levied which represented his *gage*. 2nd, that there was sufficient evidence of the insolvency of B to sustain the opposition of C as an opposition *en sous ordre*.

MONK and RAMSAY, JJ., dissenting, were of opinion that there was no allegation of insolvency, and that no evidence, if there was any such, would therefore avail, and consequently that the opposition *en sous ordre* could not be maintained. Art. 753 C. C. P., which is exclusive.

Judgment reversed.

NOTE.—The following cases, also decided at Quebec on December 7 by the full Court, do not require special notice:

NESBITT & GAGNON.—A question of evidence. Judgment reversed.

DAWSON & McDONALD.—Confirmed.

BERNIER & COURIER.—Clerical error in judgment.—Reformed.

CHALONER & BARY.—Question of evidence.—Judgment confirmed.

In CONNOLLY & THE PROVINCIAL INS. CO., *ante*, p. 33, Monk, J., dissented.

CIRCUIT COURT.

Waterloo, Dec. 12, 1877.

DUNKIN, J.

Ex parte LONG, Petitioner for Certiorari; and BLANCHARD, Respondent.

Circuit Court—Certiorari—C. C. P. 1056, 1225.

Held, that the Circuit Court has no jurisdiction by means of *certiorari* over judgments other than those of Commissioners' Courts or Justices of the Peace; and a writ of *certiorari* to quash the judgment of a District Magistrate was set aside.

Certiorari quashed.

Huntington & Noyes for Petitioner.

A. D. Girard for Respondent.

CURRENT EVENTS.

GREAT BRITAIN.

EXPROPRIATION CASE.—We give below the text of the judgment of the Judicial Committee of the Privy Council, Dec. 10, 1877, dismissing the appeal of Dame Harriet Morrison and others from the judgment of the Court of Queen's

Bench at Montreal in the case of *Morrison et al. v. The City of Montreal*.

Present:—Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.

Their Lordships are called upon in this appeal to reverse two judgments of the Court of Queen's Bench at Quebec with reference to the amount of compensation to be paid by the respondents, the Corporation of the City of Montreal, to the appellants, as proprietors of certain lands expropriated for the purpose of forming a park, to be called Mount Royal Park.

It appears that, by an Act of the Colonial Legislature, 27 and 28 Vict., cap. 60, the Corporation were authorized to make very extensive improvements in the City of Montreal, and for that purpose to take lands compulsorily. By the preamble it was recited that the then existing law of expropriation led to great delays, and by section 13 a new mode of assessing compensation was provided.

By that section it was enacted that in case the Corporation should not be able to come to an amicable arrangement with the persons interested in the ground or real property required to be taken, as the price or compensation to be paid for the same, the Superior Court of Lower Canada for the district of Montreal, or a Judge thereof, should appoint three competent and disinterested persons as commissioners to fix and determine the price or compensation to be allowed for such land or real property, and that the Court or Judge should fix the day on which the commissioners should commence their operations, and also the day on which they should make their report.

By sub-section 5 of that section, the Commissioners, before proceeding, were to be duly sworn, and they were vested with the same powers and entrusted with the same duties as were conferred by the laws in force in Lower Canada upon experts in reference to appraisements, one of those duties being to view the property to be appraised.

By sub-section 7 it was enacted that it should be the duty of the Commissioners to diligently proceed to appraise and determine the amount of the price, indemnity or compensation which they should deem reasonable, and they were thereby authorized and required to hear the parties and to examine and interrogate their

witnesses, as well as the members of the Council and the witnesses of the Corporation; but it was declared that the said examination and interrogatories should be made *viva voce* and not in writing, and consequently should not form part of the report to be made by the said Commissioners. The section then provided that if, in the discharge of the duties devolving upon the Commissioners, there should occur a difference of opinion between them, the decision of two of the Commissioners should have the same force and effect as if all the said Commissioners had concurred therein.

Sub-section 12 was as follows:—

"On the day fixed in and by the judgment appointing the said Commissioners, the Corporation of the said city, by their attorney or counsel, shall submit to the said Superior Court, or to one of the Judges thereof respectively, the report containing the appraisal of the said Commissioners, for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal."

That sub-section was afterwards amended by the 35 Vict., cap. 32, sec. 7, which contained, amongst other things, the following words:—

"Sub-section 12 of clause 13 of the Act 27th and 28th Victoria, chapter 60, is amended by adding at the end of the said clause the following words, to wit: 'for the purposes of the expropriation;' but in case of error upon the amount of the indemnity only on the part of the Commissioners, the party expropriated, his heirs and assigns, and the said Corporation, may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said Commissioners, and if upon such action the plaintiffs succeed, the Corporation shall deposit in Court the amount of the condemnation to be paid to the party or parties entitled thereto."

By the 32 Vict., cap. 70 (Quebec Statutes) power was given to the Corporation to form a park, to be called "Mount Royal Park," and by section 20 it was enacted that all the land required for the park should be deemed to be within the city, and that all the powers of expropriation possessed by the Corporation of Montreal should extend to it. By section 22, however, an alteration was made as to the mode of appointing the Commissioners to value the property to be expropriated, and it was enacted

that one should be appointed by the Corporation, one by the party whose property should be expropriated, and the third by a Judge of the Superior Court.

Such being the state of the law, the Corporation on the 14th March, 1873, gave notice of their intention to take an estate of which the appellants were the owners, called "The Mount Tranquil Estate." The estate contained 3,543,194 superficial feet, equal to about 96 arpents and 28-100, and Commissioners were appointed to fix the price or compensation to be paid for the same. The Commissioners were Alexander McGibbon, Esq., on behalf of the Corporation; John McLennan, Esq., appointed by the appellants, and Robert W. Shepherd, Esq., appointed by a Judge of the Superior Court.

There may be a slight difference between a superficial foot in Canada and a superficial foot in England; but it will be sufficiently accurate for the purpose of this case to consider a superficial foot in Canada as equal to a superficial foot in England, and to treat the total quantity of land to be expropriated as amounting to about 81 English acres and a fraction.

On the 26th June, 1873, the Commissioners made a unanimous report by which they fixed \$210,000 as the amount to be paid as compensation. On the 5th July, 1873, the report was homologated, and confirmed by the Hon. Mr. Justice Torrance, one of the Judges of the Superior Court, after due proof adduced of the observance of all the formalities and proceedings required by the 27 and 28 Vict., cap. 60, and the 32 Vict., cap. 70.

On the 18th July, 1873, the plaintiffs commenced an action against the respondents in the Superior Court for Lower Canada, alleging in their declaration that, in awarding the sum of \$210,000, the Commissioners had fallen into error upon the amount of indemnity, and that they ought to have awarded the sum of \$539,920, which was the true value of the property for purposes of expropriation.

The defendants, by their plea, denied that there was any error so far as the plaintiffs were concerned or interested, and alleged that the sum of \$210,000 was, and is, in excess of the real value of the property.

The case was tried in the Superior Court by the Hon. Mr. Justice Johnson, who awarded to the plaintiffs the sum of \$245,000, in addition

to the amount of \$210,000 previously paid under the award of the Commissioners. From that judgment the defendants, the present respondents, appealed to the Court of Queen's Bench for the Province of Quebec, and the plaintiffs, the present appellants, presented a cross appeal, seeking to augment the sum awarded to them by the Superior Court by the sum of \$429,000, making the total amount \$100,000 in excess of the amount claimed by them in their action.

The appeal and cross appeal were heard together, and on the 22nd June, 1876, the Court of Queen's Bench reversed the judgment of the Superior Court and dismissed the action of the plaintiffs. The Hon. Mr. Justice Monk and the Hon. Mr. Justice Ramsay, two of the Judges of the Court of Queen's Bench, dissented from the judgment of the majority of the Judges of that Court.

It was contended on behalf of the respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shown that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in Canada, in the case of *Montreal v. Bagg*, 19 Lower Canada Jurist, 136, and also in the present case, one learned Judge only dissenting, that whenever it can be shown that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the Statute. The construction contended for is wholly inconsistent with the 27 and 28 Vict., cap. 60, sec. 13, cl. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict., cap. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissioners as regards the amount of the indemnity awarded by them. In determining that question, their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account, and that for the purpose of this appeal, it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that, in valuing land for the purpose of expropriation, the prospective capabilities were not to be taken into consideration; and that, although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their reports, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their report are silent as to their reasons; but their Lordships, having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., \$210,000, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4s., the sum awarded was equal to £42,000, which for 81 acres was at the rate of nearly £520 an acre for the land, which at the time of the expropriation was producing but little, if any, profit.

The \$245,000 awarded by the learned Judge in addition to the \$210,000 awarded by the Commissioners make a total of \$455,000, which at 4s. a dollar is equal to £91,000, or upwards of £1,120 an acre for each of the 81 acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, as it appears to their Lordships, was, was there error on the part of the Commissioners in awarding only the sum of

\$210,000, and, if so, to what extent were the plaintiffs entitled to an augmentation of it?

The report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The onus of proving error on the part of the Commissioners lay upon the plaintiffs. The judgment of the Commissioners, as expressed in their report, was entitled to great weight. It is not in this case merely the judgment of a majority. The report was unanimous, and was one in which the Commissioner appointed by the appellants themselves concurred. Their Lordships are of opinion that it should not be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his judgment the learned Judge remarked:—"I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved. If this evidence is untrue, it was the business of the defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it."

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordships' opinion the learned Judge attached too much importance to the opinions of witnesses, which were chiefly of a speculative character; and they have to observe that the

amount awarded by him exceeded the valuation of some of the claimants' own witnesses.

Their Lordships, therefore, concur with the majority of the judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties, and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring against the opinion of the majority of the judges of the Court of Queen's Bench that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments of the Court of Queen's Bench and to dismiss this appeal. The appellants must pay the costs of the appeal.

CANADA.

SUPREME COURT.—The Session of the Supreme Court opened at Ottawa, Jan. 21, with an augmented list of causes for hearing. We defer notice of proceedings to next issue.

THE INSOLVENT LAW.—At the annual meeting of the Dominion Board of Trade, at Ottawa, Mr. Andrew Robertson, of Montreal, gave the following figures showing the operation of the Insolvent Act in Canada:—

Years.	Insolvents.	Liabilities.
1872.....		\$ 6,444,525
1873.....	924	12,334,192
1874.....	966	7,896,765
Total.....		\$26,496,482
Or a yearly average of.....		\$ 8,331,827
During the last three years there were in		
1875.....	1,968	\$28,843,988
1876.....	1,729	25,517,991
1877.....	1,890	25,510,000
Total.....	5,586	\$79,871,979
Or a yearly average of.....	1,862	\$26,628,986

Another effort to repeal the Act will probably be made during the approaching session of Parliament.

INDEPENDENCE OF PARLIAMENT.—Several elections have taken place and others are in progress, in Nova Scotia and New Brunswick, occasioned by the resignation of members of Parliament who have inadvertently brought themselves within the reach of sec. 2 of 31 Vict., cap. 25, "An Act further securing the independence of Parliament." The section reads as follows:—

"2. No person whosoever holding or enjoying, undertaking or executing, directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party, any contract or agreement with Her Majesty, or with any public officer or department with respect to the public service of Canada, or under which any public money of Canada is to be paid for any service or work, shall be eligible as a member of the House of Commons, nor shall he sit or vote in the same."

QUEBEC.

The Court of Queen's Bench, Appeal Side, sits at Montreal, Jan. 29, for the purpose of rendering judgments.

RECENT ENGLISH DECISIONS.

Company—Forfeiture.—In a notice by the secretary of a company to a shareholder to pay an overdue call or assessment, the latter was notified to pay the call with five per cent interest from the day when the call was voted, or he would forfeit his stock; whereas the rules of the company prescribed interest in such cases only from the day when the call became payable. *Held*, that such notice was invalid, and no forfeiture took place. *Johnson v. Lytle's Iron Agency*, 5 Ch. D. 687.

Husband and Wife.—O. was a clothier, and lived with his mother, but owned another house near by, where, in 1855, he installed the defendant as housekeeper, and soon after engaged to marry her. In 1861, she began on a small scale the business of fruit preserving. The business gradually increased until it became a large wholesale business. In 1874, O. married her, and went to live with her in the house she had occupied. She had carried on the business before the marriage entirely as her own, with her own means, and kept her own bank account, and at the date of the marriage she had over £1,500 on deposit. The husband's account at the same bank was overdrawn, and without his knowledge she drew from her account and deposited the amount to his to make good the

deficit. After the marriage she continued to carry on the business in her maiden name as before, and he did not in any way interfere with it, but always referred customers to her. He died intestate, and she claimed the business as her own; but his sister applied for administration on it as his. *Held*, that the widow was entitled to the whole capital and stock in trade of the business as her own.—*Ashworth v. Outram*, 5 Ch. D. 923.

Injunction.—In a suit by one riparian proprietor against another farther up the stream, for polluting it to the injury of the plaintiff, an injunction was asked for and also an inquiry as to damages. The defendant claimed that only damages should be awarded as in the case of obstruction of light and air. An injunction was granted.—*Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769.

2. 18 & 19 Vict. c. 128, § 9, forbids burials within one hundred yards of a dwelling house. The plaintiff applied for an injunction to restrain the defendant from using a field, or any part thereof, as a cemetery, some portion of which field was within one hundred yards of plaintiff's dwelling. It appeared that, in 1865, defendant obtained from the Secretary of State permission so to use his field, but had not been able to act on the permission; that he had recently tried to form a company for the purpose, but had failed; that he did not intend to use any of the land within one hundred yards for burials without the plaintiff's consent; that he had offered to give two months' notice to defendant whenever he proposed to act at all in the matter; and that the defendant had offered to suspend proceedings if the plaintiff would agree not to use any of the field for a cemetery. Bacon, V.C., granted a temporary injunction. *Held*, that the injunction must be dissolved.—*Lord Cowley v. Byas*, 5 Ch. D. 944.

RECENT UNITED STATES DECISIONS.

Arbitration.—To a bill to wind up a partnership, it is no defence that the articles of partnership provide for a reference of disputes to arbitration, and that the defendants have always been willing to refer.—*Pearl v. Harris*, 121 Mass. 390.

Bankruptcy.—If a collector of taxes has collected taxes and not paid them over to the

town, his debt to the town is a fiduciary debt, not barred by a discharge in bankruptcy.—*Richmond v. Brown*, 66 Me. 373.

Bigamy.—A married man, whose wife was living, went through the ceremony of marriage with another woman, whom he could not lawfully have married had he been single, he being a negro and she a white person. *Held*, that he was guilty of bigamy.—*People v. Brown*, 34 Mich. 339.

Bill of Lading.—Defendants' agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, gave M. bills of lading for the goods mentioned in the receipt, knowing that he intended to raise money on the bills; and plaintiffs advanced money to M. on the security of the bills. *Held*, that the defendants were bound by their agent's act, and estopped to deny the receipt of the goods. (Earl, C. dissenting).—*Agnew v. Michigan Central R. R. Co.*, 65 N. Y. 111.

Constitutional Law.—1. A State Legislature has power to fix maximum rates to be charged for the storage of grain in elevators.—*Munn v. Illinois*, 94 U.S. 113.

2. Or for the carriage of passengers and goods by rail, though the railroads are owned by corporations, if their charters are granted subject to alteration or amendment.—*Chicago, Burlington, & Quincy R. R. Co. v. Iowa*, 94 U.S. 155.

3. A State statute requiring all vessels entering a harbor in the State to pay a tax of three cents per ton, imposes a duty of tonnage, and is therefore unconstitutional.—*Inman Steamship Co. v. Tinker*, 94 U.S. 238.

4. A State statute empowering and requiring certain officers, to the exclusion of all other persons, to make a survey of the hatches of all sea-going vessels arriving at a port in the State, *held*, unconstitutional as a regulation of commerce.—*Foster v. Master and Wardens of the Port of New Orleans*, 94 U.S. 246.

5. A State statute, forbidding all persons not citizens of the State to plant oysters in the waters of the State, *held*, constitutional.—*McCready v. Virginia*, 94 U.S. 391.

6. The United States has the right of eminent domain within the States; but a State cannot exercise it in favor of the United States.—*Darlington v. United States*, 82 Penn. St. 382.

The Legal News.

Vol. I. FEBRUARY 2, 1878. No. 5.

ARREARS IN THE COURT OF QUEEN'S BENCH.

If we were only to consult the statistical returns in judicial matters, published annually in the *Quebec Gazette*, we should feel that it was almost impossible to hope that anything short of a revolution could bring any adequate relief to weary suitors, sighing for justice. These returns show that from the beginning of 1860 up to the end of 1876 there were 2,573 appeals taken out, and that only 2,113 were heard and decided on the merits. This shows a balance of cases unheard of no less than 460; but as many cases are settled or abandoned, or are sent to the shades below without a hearing, the judicial statistics only recognise 398 appeals as actually subsisting on the 31st December, 1876, namely 30 at Quebec and 368 at Montreal. Fortunately this presents an exaggerated statement of the difficulty, which, however, even when reduced to its real limits, is sufficiently embarrassing. The true test of the arrears before any Court is the number of cases ready for hearing, and which remain unheard from want of time for the argument. Now in Quebec there are no cases at all in this position. In Montreal the condition of matters is very different, as the following table, for which we are indebted to the learned Clerk of Appeals, Mr. Marchand, amply testifies:

Inscriptions for December Term, 1874.....	112
Heard and taken <i>en délibéré</i>	29
Adjudged.....	8
Dismissed	1
Struck from the roll.....	1
—	39

Undisposed of..... 73

Inscriptions for December Term, 1875.....	78
Heard and taken <i>en délibéré</i>	18
Adjudged.....	5
—	23

Undisposed of..... 55

Inscriptions for December Term, 1876.....	74
Heard and taken <i>en délibéré</i>	29
Adjudged.....	2
—	31

Undisposed of..... 43

Inscribed for December Term, 1877	89
Heard and taken <i>en délibéré</i>	19
Adjudged.....	2
—	21
Undisposed of.....	68

It therefore appears that the result of three years' work has been to reduce the arrears from 73 to 68, that is 5 cases, or less than 2 a year. This almost insignificant gain has only been secured by the Court hearing and deciding 628 cases in the three years, which is 190 cases more than were heard and decided in the highest three of the previous fifteen years. Nor are the arrears in Montreal due to the prolixity of the arguments. In 1877, judgments were rendered in Montreal in 135 cases, and in Quebec in 67, there being only four terms of twelve days each at Montreal, while at Quebec there are four terms of eight days each for less than half the hearings.

In addition to this it may be remarked that the appeal business in this District is greatly on the increase. In 1873 there were 199 new appeals, in 1874 there were 198, in 1875 there were 210, in 1876 there were 252; or in all, for the four years, 859. The highest four years during the fourteen years preceding 1874, give the following results:

1860	142
1862	146
1866.....	145
1869.....	160

making a total of 602, or a difference of 257 equal to 64 cases a year.

We think, then, we have shown enough to establish that some change is required in the sittings of the Court of Appeals in this District, and it only remains to decide what that change shall be. For the present we are content to place the figures before our readers. We shall only add that we are not in favour of a further extension of the system of terms. They are already too long, and their multiplication is not without inconvenience. Again, their effect is to overwhelm the judges with cases, the argument of which they cannot possibly remember, and to deprive them of the opportunity of deliberating. In fact the whole work of hearing new cases, and deliberating on the old, is huddled into the contracted limits of the terms. Of course, we understand that the judges read the cases during the vacation, but the collective deliberation ought to be a

serious matter, occupying a great deal more time than the fragments of days after the adjournment of the Court allow.

THE CASE OF MR. O'FARRELL.

We print in this issue a communication signed "Quebec," criticizing the judgment of the Court of Queen's Bench in the case of *O'Farrell & Brassard*. As our correspondent does not appear to have concluded his remarks, and others may have something to say on the subject, we will only observe at present that we do not by any means assent to the proposition that by-laws could not be framed in general terms which would meet Mr. Justice Cross' objection. The difficulty in Mr. O'Farrell's case was that there was no by-law, and no notice to the accused that he was incurring the penalty of suspension. Now, let us take an example of a general by-law. Suppose the Council enacted in general terms that engaging in trade would be punished by suspension, could an advocate who opened a grocery store plead want of notice? Or if a by-law stated that engaging in any mechanical occupation for hire would be considered derogatory to the honor of the profession, could an advocate who eked out his subsistence by mending tinware or repairing boots and shoes, plead that he had no intimation that he was laying himself open to prosecution? We see no serious difficulty in covering by a few clauses every case that is likely to arise.

REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, December 22, 1877.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and CROSS.

McDONNELL, (deft. below) Appellant; and GOUNDRY (plff. below) Respondent.

Trouble—Right of Way—Deficiency in Quantity of Land Sold.

In a deed of sale it was stipulated that the purchaser should have the right at any time to keep in his hands the whole or any part of the balance payable to the vendor, until such time as the vendor should have furnished a registrar's certificate showing the property sold to be "free and clear of all

mortgages, dowers or other encumbrances whatsoever." It appeared that part of a small island, which was included in the property sold, did not belong to the vendor, and there also existed a right of passage over the rest of this island. The island was of small value. *Held*, that the purchaser was not entitled, under the above cited clause of the deed, to retain an instalment of the purchase money sued for, there remaining unpaid another instalment which was much more than sufficient to cover the proved value of the island and the right of passage.

The respondent brought action, under a notarial deed of sale, for \$400, being an instalment due on the price of a certain mill property sold to appellant. The latter set up the following clause in the deed: "The purchaser shall have the right at any time to keep in his hands the whole or any part of the balance payable to the said vendor as above stated, until such time as the said vendor has furnished at his cost and expense, to said purchaser, a certificate of the registry office showing that the property, buildings and premises hereby sold are free and clear of all mortgages, dowers and other encumbrances whatsoever." The defendant alleged that a portion of an island, comprised in the property sold, did not belong to the vendor but to one McArthur. Moreover, there was a right of way in favor of McArthur over the island to communicate with this piece of land.

The Superior Court, Belanger, J., held that defendant had good reason to fear *trouble* by reason of McArthur's right of property and right of passage, but considered that he was not entitled to retain the instalment sued for, because there was still another instalment to become due, and this would more than suffice to indemnify defendant in case he was troubled.

CROSS, J., for the majority of the Court, considered that the judgment must be confirmed. The defendant did not by his pleas ask that he should have security; he concluded for the dismissal of the action. If he had asked for security the answer would have been that he had enough in his hands, besides the instalment sued for, to indemnify himself. The plaintiff did produce the certificate and fulfil the condition. It was for the defendant to show that there were incumbrances. He had not done that. He had merely shown that there was a right of way and a small deficiency in quantity. This did not come within the stipulation in the contract.

DORON, C. J., and MONK, J., dissenting, thought the stipulation had not been complied with, and the defendant was not obliged to ask for security merely, but could plead the clause in the deed as a defence to the action.

Judgment confirmed.

Archibald & McCormick for appellant.

A. & W. Robertson for respondent.

MIDDLEMISS (proprietor respondent in the Court below), Appellant; and NUNS OF L'HOTEL DUO OF MONTREAL (petitioners below), Respondents.

Seigniorial Rights—Property acquired by Crown.

This was a case of some peculiarity, not likely to occur again. The respondents, the *seigneurs* of the Fief St. Augustin, claimed certain seigniorial dues on an immoveable in the Fief, which the appellant had acquired from the Provincial Government in 1874 by exchange for other property. The respondents petitioned in the usual form for the nomination of experts, in order to establish the amount of indemnity or commutation due the petitioners by reason of the exchange, in place of the seigniorial rights on the land, and the amount to be paid for the redemption of the constituted rent representing the *cens et rentes* to which the property was alleged to be subject.

The appellant pleaded that the property had been acquired by the Crown for a purpose of public utility and the tenure had been changed; that the respondents had been indemnified for this change of tenure; that while the land was the property of the Crown the seigniorial rights in the Fief were abolished, and the land passed into the possession of the appellant free from all seigniorial rights, and consequently there was no occasion to commute rights which did not exist.

The Superior Court having named experts to establish the amount of indemnity to be paid in lieu of seigniorial rights, and also the amount to be paid for redemption of the constituted rent, and having homologated the report of the experts thereon, the proprietor Middlemiss appealed.

The Court of Appeal, Monk and Tessier, JJ., dissenting, reversed the judgment. The grounds for the judgment in appeal were in substance as follows:—

The immoveable had been acquired by the Crown in 1839 as the site of a lunatic asylum, an object of public utility. By this acquisition the land was re-united to the Crown domain and free forever from all seigniorial rights of the fief St. Augustin, with the exception of the right to indemnity for loss of the *mouvance*. On the 20th April, 1860, the Crown paid respondents the sum of £192. 0. 10, for right of indemnity claimed by reason of such acquisition. After the abolition of the seigniorial tenure in the fief St. Augustin in 1860, the respondents could only claim a right of commutation on such alienations as before the abolition would have given rise to a right of *lods et ventes*, and the exchange made by the Provincial government of this lot for another owned by the appellant did not revive the seigniorial rights which had been abolished by its reunion with the crown domain. The exchange, even before the abolition of seigniorial tenure in the fief, would not have given rise to *lods et ventes*, and therefore respondents could not claim commutation right by reason of the exchange.

Judgment reversed.

Geoffrion, Rinfret & Archambault for Appellant.

Pagnuelo & Major for Respondents.

HALL (plff. below), Appellant; and ATKINSON (defct. below), Respondent.

Revendication—Lien.

This was a case heard at Quebec. The appellant claimed by a *saisie-revendication* a quantity of logs which the respondent held and refused to deliver to him.

The respondent pleaded that these logs had been wintered on his property and formed part of a larger quantity which had passed through his mill pond, for which he was entitled to be paid, and he claimed a *droit de rétention*.

The appellant answered that owing to respondent's boom and mill dam, which obstructed the River Etchemin at a point where the same was navigable and where he had no right to obstruct it, he had been forced to pass his logs through respondent's property to take them to the River St. Lawrence.

Respondent replied that he had constructed his boom and mill dam on private property which he held from the Crown.

Held, confirming the judgment of the Court below, that there was sufficient evidence to show an undertaking, on the part of the appellant, to pay for the use of defendant's property, and that the latter was entitled to a *quantum meruit* and to a *droit de rétention* until paid, the Court abstaining from deciding the question raised as to the extent of the right each party had to the use of the River Etchemin.

Judgment confirmed.

NOTE.—The following appeals, also decided during the December term, do not require special mention:—

GUY et al., Appellants; and GUY et al., Respondents.—The appeal was from a judgment of the Superior Court, declaring two lots of land *grevés de substitution* and subject to the usufruct of plaintiffs (respondents). The judgment was confirmed as to the first lot and reformed as to the second; Monk, J., concurring, but being disposed to go a little further, and to deal with both lots in the same way.

PAYTON, Appellant; and CORNELLIER GRAND-CHAMPS, Respondent.—A question of evidence as to verbal sale. Judgment reversed, Ramsay and Tessier, JJ., dissenting on the ground that the sale was not proved.

LACROIX et al., Appellants; and THE CITY OF MONTREAL, Respondents.—An action by contractors for the new City Hall, from whom a contract had been taken away. A question of evidence. The judgment of the Court below, which dismissed the action, was reversed, and \$400 allowed the appellants.

HUS, Appellant; and MILLETTE et al., and BRUNET et al., Respondents.—A question as to the ownership of some land. Judgment confirmed.

DUMARTEAU, Appellant; and SENECAI, Respondent.—Action on a note. A question of evidence. The judgment of the Court below in favor of the respondent (plaintiff) was confirmed, Ramsay, J., dissenting.

Dec. 22.

HOLDEN, Appellant; and MANN, Respondent.—An action of damages. Judgment confirmed, Monk, J., dissenting.

Erratum.—In the case of *Lavigne & Villars*, mentioned on p. 31, read "reversed" for "confirmed."

PRIVY COUNCIL.

Dec. 12th, 1877.

LAMBKIN v. SOUTH EASTERN R. R. Co.

Appeal to Privy Council—Interlocutory Judgment.

The verdict of a special jury awarded the plaintiff \$7,000 damages for injuries sustained in a railway accident, and judgment was rendered against the defendants by the Superior Court, Montreal, in accordance with the verdict. This judgment being reversed and a new trial ordered by the Queen's Bench in appeal, the plaintiff moved for leave to appeal to the Judicial Committee of the Privy Council. The Q. B. rejected the application on the ground that the judgment being interlocutory was not susceptible of appeal.

The Judicial Committee of the Privy Council considered that though this was an interlocutory judgment, it was of such a nature that an appeal should be allowed, and, in the exercise of their discretion, granted leave to appeal.

Leave to appeal granted.

Doutre, Doutre, Robidoux, Hutchinson & Walker for the Petitioner Lambkin.

SUPERIOR COURT.

Montreal, Dec. 7th, 1877.

TASCHEREAU, H. E., J.

TATE v. TORRANCE et al.

Action for debt due to dissolved Partnership—Signification—1571 C. C.

The plaintiff brought action for a debt due to a firm of Tate & Co., of which he had been a partner. By the deed of dissolution it was agreed that the business of the firm should be carried on by plaintiff and Charles Tate, to whom the retiring partner, Grant, transferred his rights. Charles Tate died and his rights were represented by the plaintiff.

Held, that it was not necessary that the deed of dissolution by which Grant transferred his rights to the other partners, should be signified to defendants before suit, such deed of dissolution of partnership and transfer not falling within the category of transfers or sales of debts or rights of action, which must be signified before action brought against third parties.

Demurrer dismissed.

Abbott, Tail, Wotherspoon & Abbott for plaintiff.

G. B. Cramp for defendants.

Montreal, Dec. 19, 1877.

PAPINEAU, J.

HOTTE v. CURRIE; McDONALD, T.S.; and GORDON et al., intervening.

Capias—Charge of Secrecion—Name of Informant—Loss of Affidavit.

Held, that in an affidavit for *capias* under Art. 798 C.C.P., declaring that the defendant has secreted, or is about immediately to secrete his property and effects, it is not necessary that the deponent should give the name of the person who informed him of the facts alleged in the affidavit, nor the special reasons which lead him to believe that the facts are true.

2. Where the affidavit on which a *capias* issued has disappeared from the record, the *capias* cannot be held good, though the contestation by defendant is manifestly unfounded.

Ouimet & Co. for plaintiff.

Trenholme & MacLaren for defendant.

Stephens for intervening parties.

Montreal, Jan. 25, 1878.

DORION, J.

GLOBE MUTUAL INSURANCE CO. OF N. Y. v. SUN MUTUAL INS. CO.

Security for Costs—Foreign Company.

Held, that a foreign Insurance Company which has a place of business in the Province of Quebec is not bound to give security for costs. [But see 21 Jurist, p. 224.—Ed. L. N.]

COURT OF QUEEN'S BENCH.

[In Chambers.]

Montreal, Jan. 22, 1878.

RAMSAY, J.

Ex parte GAUVEREAU, Petr.

Habeas Corpus in Civil Matters.

The petitioner was imprisoned for failing as *gardien* to produce goods seized, and he asked for *habeas corpus* in order to be liberated as he was a minor.

The Judge refused the application, as there was no notice to the party interested in maintaining the *contrainte*; and as the affidavit, which only contained a general reference to the allegations of the petition, was insufficient, inasmuch as it did not disclose any reasonable or probable ground for the issue of the writ. The

petitioner was allowed to withdraw his application, and it was intimated that if it were to be renewed, which perhaps might not be necessary in the interests of the petitioner in view of Art. 792, C. C. P.; the applicant should be prepared to meet the difficulty arising from section 25 of our Habeas Corpus Act, C. S. L. C., cap. 95.

CIRCUIT COURT.

Sherbrooke, Jan. 12, 1878.

DOHERTY, J.

CLEMENT v. HEATH, and BACON, petitioner.

Jurisdiction—Insolvent Act—Compulsory Liquidation.

Held, that the Circuit Court has no jurisdiction to interfere with a seizure under a writ of attachment in insolvency, though it appeared that the writ issued against a non-trader, and the same goods were under seizure in a suit in the Circuit Court.

The action was commenced by *arrêt simple*, and judgment went in favor of plaintiff for \$60. A *vend. ex.* having issued, proceedings thereunder were stopped by an order of the Judge on the petition of Bacon, assignee, who alleged that previous to the issuing of the *vend. ex.* a writ of attachment in compulsory liquidation had been issued, and the property of the defendant had thereby been vested in him.

The plaintiff contested the petition and order on the ground that the defendant was not a trader.

DOHERTY, J., said the defendant was not a trader, and manifestly not entitled to the benefit of the Insolvent Act. But the Circuit Court could not decide this question. The writ of attachment divested the defendant of all his property and vested it in the assignee, and the Circuit Court had no power to set aside the writ. The plaintiff must intervene, and contest the point in the Insolvent Court.

Contestation dismissed.

Brooks, Camirand & Hurd for plaintiffs.

W. White, counsel for plaintiff.

Ives, Brown & Merry for assignee.

—The Judge of the Sheffield (England) County Court has no confidence in the veracity of woman. On a recent occasion he stated from the Bench that there is ten times more perjury committed by women in his court than by men, and he added that women do not seem to care in the least what they swear to.

COMMUNICATIONS.

THE CASE OF MR. O'FARRELL.

To the Editor of THE LEGAL NEWS:

SIR,—In the case of *O'Farrell & Brassard* a motion was made immediately after the rendering of the judgment of the Court of Queen's Bench, referred to in your leading article of the 19th instant, for leave to appeal to Her Majesty in her Privy Council from that judgment. Under such circumstances a simple report of the case or the publication of Mr. Justice Cross' notes could have required no comment, but the prominence given to the decision and the approving remarks made in reference to it in a publication devoted no doubt to the interests and welfare of the profession, cannot be allowed to pass unnoticed. If, on the one hand, as you remark, "punishments are not to be awarded for indefinite offences, and, especially, at the pleasure of the majority of a fluctuating and almost irresponsible tribunal," it seems, on the other, that the exercise of some disciplinary power is essential to the existence of such a body as the Bar. You add further on, that "a majority of a council might be found in particular circumstances voting in a very whimsical manner, and it is wise to place some restraint upon their action by compelling them to define the acts which they intend to punish as crimes."

The latter portion of this sentence resumes all the reasoning of Mr. Cross' judgment.

At first sight it seems difficult to conceive how even so learned a body as the Bar of this Province could frame a set of by-laws containing a complete enumeration of actions derogatory to the honour of the body or constituting a breach of its discipline. A permanent board might have been constituted when the charter was granted, it might have defined ever since and go on defining for another century before its labours would be half complete, and then the ever varying sense of honour would, in course of time, make that wrong which was right at the beginning, and *vice versa*. That the law can never have intended anything so absurd is quite manifest. But we may be told the Bar might adopt by-laws in general terms, founded on the incompatibility of certain callings with

the profession, on well known and generally received rules of social intercourse and moral deportment, &c. Well, and suppose they had, would not Mr. Justice Cross' argument still hold good, and might not the party accused, in almost every particular case, complain that the act charged did not fall within the by-law as well as the statute?

We are thus left to two necessary conclusions.

1st. The charter cannot have intended to impose upon the Bar the task of defining all acts derogatory to its honour and constituting breaches of its discipline, for such would be simply impossible.

2nd. Nor could it have intended that there should be a set of rules in general terms, for such could have added nothing to the Act of Incorporation itself.

If from these considerations we turn to the statute, we find, with no little surprise, that the terms of section 3, relied upon in the judgment, are simply permissive, "the Corporation may make all such by-laws, &c," and nowhere in the law is to be found the obligation imposed upon the Bar of adopting by-laws at all. It is quite different with regard to the powers conferred upon Councils of sections, and at section 10 of the Act the expressions are declaratory and absolute. The words are as follows:—

"The council of each section shall, in and with regard to such section, have power,—

"First. For the maintenance of the discipline and honour of the body, and, as the importance of the case requires, to pronounce, through the Bâtonnier, a censure or reprimand against any member guilty of any breach of discipline, or of any action derogatory to the honour of the Bar," &c.

It is well to remark that in this section no mention is made of by-laws. The law itself defines that which the powers it confers are intended to repress, and without any reference whatever to any further definition by by-law or otherwise. There is nothing obscure in the words used, they could not be more plain. A discretionary power is vested by law in a body deemed worthy of exercising it, and it is painful to see those who have risen from its ranks to places of honour and emolument go out of their way to interfere with such a privilege. For it seems quite clear that in dealing with

members under section 10 the councils only exercise a corporate franchise and how prohibition can be used as a means of preventing a corporation from performing corporate acts it is indeed difficult to conceive. Such however is one of the "singular features" of this judgment of the Court of Queen's Bench. There are one or two others very well worth considering, but it would be scarcely fair to trespass any farther, for the present, upon your valuable space, and hoping for the same indulgence on another occasion,

I beg to remain,

Respectfully yours,

Quebec, Jan. 22nd, 1878.

QUEBEC.

EN DÉLIBÉRE.

To the Editor of THE LEGAL NEWS:

SIR,—One of the evils of our present system is the long *délibéré* which takes place in all cases, whether important or not. In the Queen's Bench (appeal side) this is always the case. After argument a case must go *en délibéré* for three months, perhaps for six months. This has become a practice (chronic). It operates injustice in many respects to suitors and to the profession. If cases were judged rapidly the roll would not be so encumbered with cases, often taken to appeal merely to obtain delay—to defeat the ends of justice in fact. These delays only encourage appeals. The men on the bench should be ready men. I presume they are so. Deliberations among them should be when the points are fresh, if any point has been raised worthy of discussion. After each term the members of the bench scatter, and the records are expected to be ubiquitous, or to go travelling in a tin box about the country. This is *en délibéré*!

Speedy justice is expected from a tribunal sitting in appeal. The bar might make the duty of the bench easier. Labourled factums should be abolished: cases made to assume more the form of a mathematical proposition. Cases should be threshed out and reduced in bulk. Long-winded arguments (beating the air) should be given up. The duty of the bar is as ministers of justice to assist the courts in the administration of justice, not to embarrass by creating difficulties which do not exist.

Let us have in the Court of Appeals speedy justice. Let bench and bar work together to

promote this end, and there would be fewer appeals, and less work and more play. After each term the Court should adjourn to a near day to render judgments in cases—as a rule, not as a variety.

DESPATCH.

CURRENT EVENTS

CANADA.

SUPREME COURT.—The Supreme Court was occupied from January 21st, the day of opening, to the 24th inclusive in hearing the appeal in the case of *James Somerville et al.*, Appellants, and *The Hon. R. Laflamme*, Minister of Justice, Respondent. The judgment appealed from, rendered by Dorion, J., July 7th, 1877, dismissed the election petition filed by Somerville and others, contesting the return of the Hon. Mr. Laflamme to the House of Commons for the County of Jacques Cartier. The case presented little of interest in a legal point of view, with the exception of some rulings at the trial on questions of the admissibility of testimony. The evidence is excessively voluminous, being directed both to the unseating and the disqualification of the sitting member, but the petitioners were unsuccessful on both points in the Court below. As long as elections are fought and contested with the extreme pertinacity which at present distinguishes them in Canada, the time of the Supreme Court is likely to be monopolized to a considerable extent by the hearing of election appeals.

On the 28th January judgment was given in the case of *The Queen v. Severn*. The question was as to the jurisdiction of the Legislature of Ontario to impose a license fee on brewers doing a wholesale business and licensed under the Revenue Acts of Canada. The Supreme Court has reversed the judgment of the Court below, and holds that the local legislature has no power to impose a license fee on brewers, such taxation not falling within sub-section 9 of section 92, B. N. A. Act.

ONTARIO.

FUSION OF LAW AND EQUITY.—A discussion of considerable interest is in progress in Ontario on the subject of the fusion of law and equity.

A writer in the *Canada Law Journal*, over the signature "Q. C.," says :—

"No matter whether it would or would not have been originally better to have left common law and chancery entirely separate, we have now gone too far with the fusion of them to get back to that position. We must therefore go on, and *thoroughly* fuse them by making all our Superior Courts which are not Courts of Appeal, both Courts of Law and Courts of Equity, to all intents and purposes. The sooner we do so the better for ourselves. Until we do, it is impossible to have any settled intelligible system of practice or pleading in any court; whereas, as soon as we shall do so, all will immediately be settled and become certain and intelligible, and we will not be compelled, as we now are, without any remuneration, to learn and keep ourselves up in two dissimilar antagonistic systems of practice, pleading and procedure, instead of only one system. Secondly, because, if effected upon proper principles, it will not only greatly improve the usefulness, practice and procedure of all the courts, but will also, in the only way possible without abolishing the Court of Chancery, get its practice and procedure sufficiently in harmony with modern ideas to make it work satisfactorily, and do away with unnecessary delays, complications, technical obstructions of justice, and a host of petty expenses impossible to be got rid of while its present system is retained. I think, however, in carrying out what 'A City Solicitor' has recommended, it would be well, in order to get rid of the injurious effects of the inveterate prejudices which usually cling to old names, when all the courts are fused, to abolish all their old names and re-name them. This would fix in the minds of their judges that their respective courts no longer differ from one another in any respect. It would also be well to make the act come into force upon a future day to be named, which day should be far enough off to enable all concerned to be able to study the new practice and procedure the act would necessitate before it should come into effect. The act should also provide that a sufficient time before that day, the judges, or chief judges at all events, of all those courts, or a majority of them, should devise a new practice and procedure to be embodied in rules of court, which should apply

always until changed, and equally to all the courts, and that no court should have any rule at any time which did not equally regulate every other Superior Court not being a Court of Appeal."

The carrying out of this reform will make the Ontario system resemble more closely that which prevails in the Province of Quebec. Many of the benefits hoped to be obtained in Ontario by the change, have long been enjoyed in the sister province.

QUEBEC.

WRITS OF INJUNCTION.—A constitutional point was raised in the Quebec Legislative Assembly, January 25th, on the second reading of Mr. Angers' Bill providing for the issue of writs of injunction in certain cases. Among the cases in which the injunction may issue is the following:—To prevent and hinder any bank or other corporation or joint stock company from registering the transfer of shares in such corporation or company, when such shares belong to minors, interdicted persons, married women not separated as to property, or unauthorized, or persons legally incapacitated, until the Superior Court shall have adjudicated on the right of property in such shares or stock, or before such Court shall have granted permission for the transfer of such shares. The question was raised by Mr. Bachand whether it was competent for the local Legislature to legislate as here proposed, inasmuch as banking is one of the subjects exclusively pertaining to the jurisdiction of the federal Parliament. Mr. Angers met this point by remarking that the incorporation of banks and their right to issue paper money are derived from the Federal authority, but questions of administration under the incorporation, such as those in relation to which this writ of injunction is to apply, are matters of civil rights and property, and clearly belong to the local authorities. All questions relating to property belong to the Provincial Legislature.

UNITED STATES.

AUTHORITY OF REVENUE OFFICIALS.—In the case of the *United States v. Mann*, it has just been decided by the Supreme Court of the United States that a bank officer was justified

in refusing to permit a revenue collector to come into the bank and look over the checks which had been paid in, to see if he could find any which had no stamp on.

THE BANKRUPTCY LAW.—There is the same dissatisfaction in the United States with respect to the bankruptcy law that exists in Canada. The *Albany Law Journal* remarks: "There is no disagreement in regard to the proposition that it is in many features not what it ought to be, and that its operation is not productive of as much good as could be wished; but as to the remedy for these things there is a want of harmony. We believe, however, that outside of a small body of interested persons, there are very few, either lawyers or business men, who would mourn over the absolute repeal of the law."

FEES OF PHYSICIANS CALLED TO TESTIFY AS EXPERTS.—The Supreme Court of Alabama has decided in the case of *Ex parte Dement*, 6 Cent. L. J. 11, that a physician, like any other person, may be called upon to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion, and upon refusal to testify may be punished as for a contempt. This seems hard upon professional men, but the *Albany Law Journal* remarks that "the conclusion is supported by authority. In *Collins v. Godefroy*, 1 B. & Ad. 590, plaintiff, an attorney, who had attended six days on subpoena as a witness for defendant, to testify in respect to the negligence and unskilfulness of another attorney, sued for a fee of six guineas, which there was evidence that defendant had agreed to pay him. The Court of King's Bench said: 'If it be a duty imposed by law upon a party regularly subpoenaed to attend from time to time and give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance, is a promise without consideration. We think such a duty is imposed by law, and that a party cannot maintain an action for compensation for loss of time in attending trial as a witness.' But see *Webb v. Page*, 1 Carr. & Kirw. 23, where it is said: 'There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant

from the nature of his employment in life. The former is bound as a matter of public duty to speak to the fact which happens to fall within his knowledge. Without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no necessity for his evidence, and the party who selects him must pay him. And in *Matter of Roelker*, Sprague's Decis. 276, the Court says: When a person has knowledge of any fact, pertinent to an issue to be tried, he may be compelled to attend as a witness. In this all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved.' See, also, *Lonergon v. Royal Exch. Ins. Co.*, 7 Bing. 731; *Elwell* Med. Juris. 592; *Ordronaux* Juris. of Med. § 113; *Lyon v. Wilkes*, 1 Cow. 591. In a paper on the 'Testimony of Experts,' read before the Academy of Arts and Sciences, the late Professor Washburn said: 'Nor do I understand that a party has a right to call upon a man of skill or science to exercise these in the trial of an ordinary question involving the right to property, or damages of a personal character, by simply summoning him, and tendering him the ordinary fees of a witness in court.'"

EXECUTIONS IN THE UNITED STATES.—During the past year 83 men were hanged in the United States. One woman, Louisa Lawson, of Virginia, was sentenced to death, but the sentence was commuted by the Governor. Of the whole number of men who suffered the extreme penalty of the law, 47 were whites, 34 were blacks or mulattoes, one was an Indian and one a Chinaman. Several persons were lynched, generally for crimes which would have ensured their legal execution, but of such cases no statistics are kept. The executions were thus distributed among the several States and Territories: Pennsylvania, 16; South Carolina, 12; North Carolina and California, 5 each; Missouri, Maryland, Georgia and Virginia, 4 each; New York, Louisiana, Arkansas, Nebraska and Tennessee, 3 each; Mississippi and Ohio, 2 each; New Jersey, New Hampshire, Delaware, Alabama, Kentucky, Texas, Utah, Dekotah, Oregon and Wyoming, 1 each.

NEW PUBLICATIONS.

THE PRETENSIONS EXPOSED of Messrs. Lang, Burnett & Co. to be "The Presbyterian Church of Canada in connection with the Church of Scotland," by Rev. Robert Campbell, M.A.: Montreal, W. Drysdale & Co.

This is an ably written pamphlet, intended to refute the pretensions of those members of the Presbyterian Church of Canada in connection with the Church of Scotland who remained out of the Union, to be considered the representatives of the old body, and entitled to bear the old name. We have no doubt of the correctness of Mr. Campbell's position, though we do not assent to all his reasons, and some of the points relied on appear to be somewhat narrow and technical to properly enter into a controversy of this character. We may add that the pamphlet contains some very strong expressions which we have no doubt the author considered himself fully justified in using, but which grate somewhat upon the ear of the dispassionate reader. It is true that equal or greater warmth has been exhibited on the other side, but the case of Mr. Campbell is strong enough to dispense with any aid of that kind.

RECENT ENGLISH DECISIONS.

Insurance.—1. Under a policy on "commission and profit" on "ship and ships, steamer and steamers," occurred the clause: "Warranted free from all average, and without benefit of salvage, but to pay loss on such part as shall not arrive." The commission and profit referred to was that on goods shipped on a British ship. By 19 Geo. II. c. 27, § 1, it is provided that no assurance shall be made on any ship belonging to His Majesty or any of his subjects, or on any goods on such ship, interest or no interest, or without benefit of salvage to the assurer; and every such assurance shall be null and void. *Held*, that under this Statute the assured on the above policy could recover neither for the loss nor the premium paid.—*Alkins et al. v. Jupe*, 2 C. P. D. 375.

2. B. & Co., wharfingers, effected insurance with the plaintiff and the defendant company, by "floating" policies, on grain and seed belonging to R. & Co. and stored with B.

& Co. R. & Co. also effected insurance on the same property with the plaintiff company. All the policies contained this condition: "If at the time of any loss or damage by fire there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." There were also the usual conditions of average in all the policies. B. & Co., by the custom of London, were responsible to the owners for the goods as though common carriers. By a fire on their wharf, grain belonging to R. & Co., among other grain, was destroyed. B. & Co. were paid in full on their policies, and this suit was brought to fix the liabilities of the companies among themselves. *Held*, that the underwriters on the policies procured by B. & Co. were alone liable; those on the policies procured by R. & Co. were not liable to contribute.—*North British Mercantile Insurance Co. v. London, Liverpool & Globe Insurance Co.*, 5 Ch. D. 569.

3. The defendant was underwriter for £1200 on plaintiff's ship, valued in the policy at £2,600. The cost of repairing certain damage by sea was, after deducting one third new for old and some particular average charges, £3,178 11s. 7d., and the salvage and general average charges paid by plaintiff were £519. The agreed value of the ship when insured was £3,000, when damaged, £998, after repairs, £7,000, which last sum was, even after deducting the cost of certain new work not charged against the underwriter, much more than the original value of the ship. *Held*, that the liability of the underwriter was to be measured by the cost of repairs, even though thereby he might be liable for more than a total loss with benefit of salvage. *Lohre v. Auchison*, 2 Q. B. D. 501.

Jurisdiction.—The Admiralty Jurisdiction Act (24 Vict. c. 10, § 7) enacts that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The action was brought by the widow of a mariner killed in the collision between the steamer *Strathclyde* and the German ship *Franconia* in the Straits of Dover, and for which the ship was to blame. *Held*, on appeal, that the Admiralty Court had jurisdiction in a case of

damage for loss of life, under the Act.—*The Franconia*, 2 P. D. 163.

Landlord and Tenant.—1. The plaintiffs let a house to the defendant for seven years from Lady Day, 1868. Defendant entered and occupied till the autumn of 1868, when he left for America, leaving the key with an agent with orders to dispose of the premises, if possible, or to make the best terms he could with the plaintiffs for a surrender. The agent gave up the keys to the plaintiffs in December, 1868. At the beginning of 1869, notices that the house was to let appeared in the windows, by plaintiffs' authority, and they attempted to let the house; and, during 1870, some of the plaintiffs' workmen, in their business, occupied the house a part of the time. In March, 1872, the house was let, and plaintiffs brought action for the rent up to that time. *Held*, that there was no evidence of a surrender of the defendant's lease by operation of law.—*Oastler v. Henderson*, 2 Q. B. D. 575.

2. The defendant let F. a house under a lease by which F. was to do all the repairs, with certain exceptions. The house was, at the time of the lease, in good repair, and the lease contained no stipulation that defendant should do any repairs. During the tenancy, owing to a portion of the house included in the exceptions being out of repair, a chimney-pot fell on the head of the plaintiff, who was a servant of F., and injured him. *Held*, that he could not recover of the defendant.—*Nelson v. The Liverpool Brewery Co.*, 2 C. P. D. 311.

Legacy.—1. A testator left a fund in trust to keep in repair a certain tomb, and when the surplus income reached £25, to pay the balance above £20, from time to time, for the relief of three poor persons in each of the parishes of C. and S. *Held*, that, as the provision about the tomb was void, the whole income should be applied to the second object.—*In re Williams*, 5 Ch. D. 735.

2. A testator, after certain specific bequests, proceeded: "I direct that my debts, including a debt of £300 owing from me to my daughter Jane, be paid." He owed his daughter Jane only £150. *Held*, that an intention to make Jane a bequest could not be understood, and that she was not entitled to the other £150.—*Wilson v. Morley*, 5 Ch. D. 776.

RECENT UNITED STATES DECISIONS.

Bills and Notes.—A written promise was given, to pay a sum in six months, "or before, if made out of the sale of" a certain article. *Held*, that this was a good promissory note, payable absolutely in six months.—*Walker v. Woollen*, 54 Ind. 164.

Burial.—The by-laws of a cemetery corporation required a written permit from the secretary for interments. The officers of the corporation resolved to refuse permits for the burial of colored persons. *Held*, that such refusal was unreasonable, and void as against persons who were already owners of lots in the cemetery.—*Mount Moriah Cemetery Association v. Commonwealth*, 81 Penn. St. 235.

Carrier.—The owners of a sleeping car, who receive payment for particular berths on each trip from passengers who have paid their fare on the railroad, no part of which fare goes to such owners, are not liable, either as carriers or inn-keepers, for money stolen from passengers on their car.—*Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

2. A railroad is not liable as carrier for a passenger's baggage after it has arrived at its destination, and he has had a reasonable time to take it away; and such time is not extended by the fact that he is delayed on the way by illness.—*Chicago, Rock Island, & Pacific R.R. Co. v. Boyce*, 73 Ill. 510.

3. Carriers received goods for transportation, knowing them to be the property of the consignor; but without his knowledge, and without transporting them, delivered them at the place where they received them, on the consignee's order, to a third person. *Held*, that they were liable to the consignor.—*Southern Express Co. v. Dickson*, 94 U. S. 549.

Conflict of Laws.—1. A chattel mortgage, duly recorded as required by the law of the State where it is made, gives the mortgagee a good title as against a *bona fide* purchaser from the mortgagor in another State, whither the mortgagor has removed the chattels, and where the mortgage is not recorded.—*Hall v. Pillow*, 31 Ark. 32.

2. An anti-nuptial contract was made in Switzerland, where the parties lived and in-

tended to remain. Afterwards they came to Illinois, where the husband acquired property, and the wife died. *Held*, that her heirs could claim nothing under the contract.—*Bess v. Pellochoux*, 73 Ill. 285.

3. By the law of New Brunswick, usurious contracts are utterly void, and the lender forfeits principal and interest. A promissory note, bearing lawful interest, was made in that Province, and secured by mortgage of land in Maine. After the money was due, illegal interest was exacted for forbearance to require payment. In a suit to foreclose, *held*, that the mortgagor could not avoid the mortgage, nor reduce the amount due on it by setting off the extra interest paid.—*Lindsay v. Hill*, 66 Me. 212.

Consideration.—A gratuitous subscription, to promote the objects for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something, or incurred some liability; and it is not sufficient that others were led to subscribe by the subscription sought to be enforced.—*Cottage Street Church v. Kendall*, 121 Mass. 528. See *Low v. Foss*, ib. 531.

Corporation.—1. Where a new corporation is formed by consolidating several existing corporations, "with all the powers, privileges, and immunities of each," it has only such powers, privileges, and immunities as were common to all, and not such as some had and others had not.—*State v. Maine Central R. R. Co.*, 66 Me. 488.

2. A company was incorporated to protect property from fire. *Held*, that the property of the company was held to charitable uses.—*Bethlehem v. Perseverance Fire Co.*, 81 Penn. St. 445.

3. The new Constitution of Pennsylvania provides that at corporation elections of directors or managers, each member may cast all his votes for one candidate or distribute them among several candidates, as he may prefer; which is construed by the Courts to mean that any stockholder may cast all the votes which his stock represents, multiplied by the number of directors to be chosen, for a single candidate, if he will. *Held*, that this provision did not apply to a corporation whose charter, granted before the constitution, provided that each

share should entitle the holder to one vote.—*Hays v. Commonwealth*, 82 Penn. St. 518.

4. An act of the legislature of South Carolina passed during the war, incorporating a company for the purpose of running the blockade, *held*, to be wholly unlawful and void, and to confer no power on the company to sue for any cause of action.—*Chicora Co. v. Crews*, 6 S. C. 243.

Damages.—1. Where one is bound in a certain sum not to carry on a trade within certain limits of time and place, the sum named is, as a rule, liquidated damages and not a penalty.—*Holbrook v. Tobey*, 66 Me. 410.

2. Action against a carrier for breach of his contract to carry salt by water to a market. *Held*, that the measure of damages was the excess of the value of the salt at the market at the time when it should have arrived, beyond its value at the point of departure and the expense of transportation as agreed; and that the extra expense of transporting it by land was not recoverable.—*Ward's Central & Pacific Lake Co. v. Elkins*, 34 Mich. 439.

3. Exemplary damages cannot be recovered against a railroad corporation for the tort of its agent, unless the corporation ratified the wrongful act, or was negligent in having such an agent.—*Hays v. Houston & Gt. Northern R.R. Co.*, 46 Tex. 272.

Deed.—A mortgage of a married woman's land named her alone as grantor, and purported to be executed by her alone; but was in fact signed, sealed, and acknowledged by her husband also. *Held*, that it was his deed as well as hers, and so valid.—*Thompson v. Lourein*, 82 Penn. St. 432.

Demurrer.—Defects in a writ or its return cannot be taken advantage of on demurrer.—*Smith v. Dexter*, 121 Mass. 597.

GENERAL NOTES.

—The London *Standard* thus speaks of the bar in Russia:—"The bar is far behind in its standard of professional honor and dignity. A system obtains of bargaining with the client for payment by results. Indeed, the bar in Russia is mercenary and rapacious. The barrister regulates his fee in much the same way as an advertising quack doctor would do, and carries on his work in the lowest commercial spirit."

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WAREHOUSE RECEIPTS.

Two cases of considerable importance, bearing upon the law in relation to warehouse receipts, were decided at the sitting of the Court of Queen's Bench at Montreal, Jan. 29. In one, in which *Robertson et al.* were appellants and *Lajoie*, Assignee, was respondent, the action was brought by the respondent on warehouse receipts signed by the appellants in the following form:—

"Received from Ritchie, Gregg, Gillespie & Co., on storage, in yard Grey Nun street, the following merchandise, viz:—

"(300) Three hundred tons No. 1 Clyde Pig Iron. Storage free till opening of navigation.

"Deliverable only on the surrender of this receipt, properly endorsed.

"Montreal, 5th March, 1873.

"(Signed)

"Thomas Robertson & Co."

Robertson & Co. had sold a quantity of iron to Ritchie, Gregg, Gillespie & Co., and got notes for it. The iron, however, by the desire of Ritchie & Co., remained in the possession of the vendors, who gave receipts for it in the above form. These receipts were endorsed by Ritchie & Co. to Nelson Davis, who was at the time making large advances to Ritchie & Co. Davis subsequently made a demand on Robertson & Co. for the iron, but the latter, having become alarmed at the financial condition of Ritchie & Co., refused to deliver. Davis thereupon brought an action against Robertson & Co., praying that they be ordered to deliver over the iron to him, and in default to pay the value, \$21,856. Davis having become insolvent, the suit was continued by his Assignee, Lajoie, the respondent.

The Court of first instance, after contestation, rendered judgment in accordance with the conclusions, ordering Robertson & Co. to deliver over the iron, or in default to pay the amount mentioned. It was from this decision that the appeal was brought by Robertson & Co. Their pretensions were substantially as follows:—

1st. That they had not been paid for the iron, and that, without payment, the sale was not complete.

2nd. That not being warehousemen by call-

ing, the receipts given by them had no legal value as warehouse receipts, and the endorsement of them, so long as the iron was not paid for, conveyed no title.

3rd. That Davis was aware that Ritchie & Co. had not paid for the iron, and were unable to pay for it, and that the transaction between Davis and Ritchie & Co., was contrived with fraudulent intent. (This plea was unanimously held to be not proved.)

The judgment of the Court of Queen's Bench sitting in appeal, which was rendered by Ramsay, J., held:

1st. That the document recited above was a warehouse receipt, and not a mere delivery order.

2nd. That the parties signing such receipt, who were unpaid vendors of the iron, could not pretend, against a holder of such receipt in good faith, that it was not a warehouse receipt inasmuch as they were not warehousemen.

3rd. That such warehouse receipt might be transferred by endorsement as collateral security for a debt contracted at the time in good faith, the pledgee Davis having no notice that the pledgors were not authorized to pledge, the proof of such knowledge being on the parties signing the receipt.

4th. That an obligation contracted at the time may be made to cover future advances, but not past indebtedness.

Two of the Judges—Chief Justice Dorion and Mr. Justice Cross—differed from the majority, but the grounds of dissent did not imply that they took a different view of the law. They would have reversed the judgment inasmuch as the declaration averred that the warehouse receipts were transferred for advances, without setting forth that it was for advances subsequent to the transfer of the receipts. The majority of the Court concurred in the opinion that the declaration was defective in this respect, but held that the defect had been covered, the defendants not having demurred on this ground though the declaration had been specially demurred to, and having allowed the the plaintiff to prove the fact that advances to a much greater amount than the value of the iron mentioned in the receipts had been made by Davis to Ritchie & Co. subsequent to the transfer of the receipts to him. The appeal was therefore dismissed. As we understand

that the opinion of the Judicial Committee of the Privy Council will probably be obtained on the case, this statement of the points involved may suffice for the present.

The other case, in which *Hearle* was appellant and *Rhind* respondent, as the facts were found by the Court, presented less difficulty. The action was brought by *Hearle* on warehouse receipts purporting to be granted by the *Moisic Iron Company*. These receipts were signed in part by the president of the company, and in part by the secretary. The company had become insolvent, and Mr. *Rhind*, the assignee, pleaded that the *Moisic Company* were not by trade warehousemen, and that the president and secretary had no authority to grant such receipts. There was no evidence to establish such power on the part of the company's officers, or to show that the company was a warehousing company. The Court held unanimously that such receipts so signed did not bind the company, more particularly where there was no evidence of any connection between the pretended indebtedness (certain notes produced) and the warehouse receipts. The judgment of the Court below was therefore confirmed. The Court, taking this view, declined to express any opinion as to the effect of the limitation of the right to hold the pledge beyond six months, mentioned in *Consol. Stat. Canada*, chap. 54.

CONFLICTING DECISIONS.

Considerable embarrassment is often felt by members of the profession in determining the proper course to be followed in matters of procedure. That embarrassment is not lessened when, as sometimes happens, they find decisions by judges of the same Court, of equal authority, which are precisely opposite one to the other. An example of this appeared in our notes of cases last week, and as the point is presumably of some interest to those who are engaged in practice, it may be worth while to draw attention to it. In the case of *The Niagara District Mutual Fire Insurance Co. v. Macfarlane* (21 L. C. J. 224), it was held by *Torrance, J.*, in September last, that the plaintiffs, an insurance company having their head office in St. Catharines, in the Province of Ontario, but having an office and doing business in Montreal, could be compelled to give security for costs. In January

following, *Dorion, J.*, having to decide the same point in *The Globe Mutual Insurance Co. of New York v. Sun Mutual Insurance Co.* (ante, p. 53), held that the company plaintiff could not be compelled to give security.

REPORTS.

SUPERIOR COURT.

Montreal, December 28, 1877.

DORION, J.

HOMIER v. BROSSEREAU et al.

Sale of Debt—Guarantee.

Held, that the vendor of a *créance* with promise to *garantir, fournir et faire valoir* is surety for the solvency of his debtor only, and is not *obligé direct* for the payment of the debt transferred. And therefore the *cessionnaire* can exercise his recourse *en garantie* only after discussion of the property of the debtor and establishing his insolvency.

Archambault & Cie. for plaintiff.

Jetté & Cie., and *Lacoste & Cie.* for defendants.

SEMPLE v. MCAULEY.

Tender—Composition.

To an action on a note the defendant pleaded an agreement by plaintiff to accept a composition of twenty-five cents in the dollar, upon the amount of his claim, and alleged that he had tendered the amount; but he did not renew the tender by his plea, nor deposit the money in Court. *Held*, that the tender could not avail in defendant's favor as a payment, and the agreement to accept the composition rate being conditional on actual payment, the plaintiff was entitled to recover the full amount of the debt in consequence of defendant's default to pay the composition.

Macmaster & Co. for plaintiff.

A. & W. Robertson for defendant.

MACKAY, J.

BAYLIS v. CITY OF MONTREAL.

Assessment Roll.

The plaintiff had paid to the city certain sums of assessment exacted from him for the widening and opening of streets, the payments being made in accordance with an assessment roll prepared in the usual way, based on a reso-

lution of the City Council assessing the cost of the improvements on proprietors interested. He claimed to be reimbursed by the city the amount of these payments, alleging the nullity of the assessment roll, but without specifying particularly the grounds of nullity. *Held*, that he could not recover without getting the assessment roll set aside.

Barnard for plaintiff.

R. Roy, Q.C., for defendant.

WINDSOR HOTEL COMPANY V. LAFRANÇOISE.

Company—Subscription—Change of Name.

The company plaintiff brought action for unpaid calls on stock subscribed by the defendant. Plea, that defendant never subscribed for any stock in the Windsor Hotel Company, but in another company called the "Royal Hotel Company." He admitted his signature in a book produced at the trial, in which the name "Windsor" had been substituted for "Royal," and the capital had been changed from \$600,000 to \$500,000. *Held*, that, in default of proof by the plaintiffs that the alterations were made before the defendant signed the book, the action could not be maintained.

Abbott & Co. for plaintiff.

Kerr & Co. for defendant.

Montreal, Dec. 29, 1877.

TORRANCE, J.

LABELLE V. LES CLERGS DE ST. VIATEUR (JOLIFFES).

Corporation—Negligence.

Held, that a body incorporated for educational purposes is liable for the negligence of its members in the performance of their trust.

The plaintiff in her own name, as widow of the late Joseph Octave Boin *dit* Dufresne, and as tutrix to her two minor children, issue of her marriage with the said Boin *dit* Dufresne, claimed damages from the defendants. On the 24th June, 1872, the inhabitants of Joliette were celebrating the day of St. Jean Baptiste. A cannon of old fashioned construction, the history of which is not known, was discharged throughout the day in connection with the celebration on the grounds of the defendants. It was managed by two of their senior pupils, and after a twelfth or thirteenth discharge it burst, about six in the afternoon. A fragment of the cannon

flew into the air and descended three or four arpents off on the land of the deceased, and struck him in the abdomen. He fell to the ground, was insensible, then recovered his consciousness for a few moments and expired. The action of damages was based upon the charge of negligence on the part of the defendants in allowing the cannon to be fired with this unhappy result. The defendants pleaded that they were incorporated for purposes of education, and could not be liable for the acts of imprudence or neglect of their members. They further pleaded that there was no negligence on their part; that the celebration was in the hands of the community; and that the death was by a *force majeure* for which they were not responsible.

TORRANCE, J. The first pretension of the defendants, that they could not be liable for the negligence of their members, being incorporated for the purposes of education, is easily disposed of. If, in the performance of their trust, as educators of the young, they or their members are guilty of negligence, they must answer for it. The facts show that the cannon was in their possession, discharged on their grounds by two of their oldest pupils, being a guarantee that the firing would be conducted with prudence. The director was from time to time looking on. I am quite ready, from the simple bursting of the cannon, to infer negligence, but it is, in addition, said that the cannon was loaded with turf for wadding, and the ramrod was a piece of iron which was used with some force or violence to drive home the charge of powder. The defendants have raised a question of contributory negligence in this, that deceased was participator in the celebration, and particularly in the discharging of the cannon. It is proved that in former years he had fired the cannon, and taken an active part in the celebration, and in the year of his death, when preparations were made for the fete, he was asked, among others, to contribute money towards the expenses, and among these expenses was the purchase of powder, used in loading the cannon. It is not proved that he was in any way connected with the discharge of the cannon on the 24th of June, 1872. He met with his death, not through any *force majeure* or inevitable accident, but, I am bound to believe and to say, through the negligent use of the ordnance in the hands of inexperienced boys. Finding negligence proved

against the defendants, it remains to me to assess the damages, and in view of the extreme youth of the minors, whose father was only 25 at the time of his death, I assess these damages at \$600 for the widow and \$600 for the infant children, in all, \$1,200. No special damages are proved, but the deceased was engaged in commerce supporting his wife and household, and had the prospect of a long life before him, and his untimely end may well be regarded as a great blow and loss to his family.

Duhamel & Pagnuolo for plaintiff.

L. A. Jetté for defendants.

ANSSELL V. SIMPSON.

Sale by Collector of Customs—Goods pledged for Customs Duties.

The plaintiff complained of the defendant in his quality of Collector of Customs at Montreal. The defendant was advertising for sale and proceeding to sell certain goods which he alleged had been transferred to defendant as security only. Plaintiff obtained an order from a judge on the 9th October last on which the sale was suspended. The defendant pleaded that the plaintiff being indebted to the Government in the sum of \$3,900.85, transferred to defendant as security for such indebtedness the goods in question, and it was understood that plaintiff should have 60 days within which to pay his indebtedness, within which delay defendant agreed with plaintiff, with the permission of the Commissioner of Customs, that he should not sell or transfer said goods. That said goods were advertised for sale on the 10th of October, 1876, long after the expiration of said 60 days, after repeated notices to plaintiff, which defendant in his said capacity had a right to do.

TORRANCE, J. I do not think that the plaintiff has much to complain of. On the 23rd of June, 1876, he received a written notice from the defendant that if the duties payable by him to the Government were not paid on or before the 26th of June, the goods in question would be sold by public auction. The statute 31 Vic. c.6, sections 13 and 60, provides for the sale in this form of goods of importers for unpaid duties, and I am at a loss to see what ground there is for the complaint against the defendant.

Robidoux for plaintiff.

A. Robertson, Q. C., for defendant.

CALMEL V. CITY OF MONTREAL.

Assessment—By-law.

Held, that taxes paid under an existing by-law cannot be recovered until the by-law has been set aside.

The plaintiff, in May, 1876, instituted an action to recover from the city the sum of \$500 alleged to have been unduly levied from him under a pretended by-law of the city imposing a tax of \$500 upon butchers' stalls.

TORRANCE, J. The by-law has not been set aside or declared invalid, and clause 44, under which the tax of \$500 has been imposed, seems to be plain enough in itself. It is true that a conviction made under the penalty clause has been quashed, but I am not prepared to say that the defendant has any action to recover until the by-law has been set aside, if such action could ever lie. It was admitted, I think, at the bar that such an action as the present would not lie in England. Under the circumstances, the plaintiff having paid his money under an existing by-law cannot recover.

W. H. Kerr, Q. C., for plaintiff.

R. Roy, Q. C., for defendant.

SUPERIOR COURT IN REVIEW.

Montreal, Nov. 30, 1877.

Present:—TORRANCE, DORION, and PAPINEAU, JJ.

THOMPSON V. MACKINNON.

Trade Mark—Sale of Business.

The defendant, Mackinnon, who had carried on for several years the trade of a biscuit maker, used a label, or trade-mark, consisting of the word, "Mackinnon's," under which was engraved a boar's head, holding a bone in his jaws. This label was used upon every box of biscuits manufactured by defendant, and the biscuits themselves were branded with the name "Mackinnon." The defendant having sold to the plaintiff his estate and effects, stock-in-trade, "with the good-will and all advantages pertaining to the name and business of the said John Mackinnon," *held*, that the sale passed the trade-mark.

DORION, J., cited Adams on Trade-marks, p. 103: "Where a business is sold, the entire good-will and the right to use the trade-mark pass to the purchaser without any express mention being made of them in the deed of assignment, and the Court will restrain any subsequent

attempt on the part of the vendor to retain either for his own use." The judgment appealed from was, therefore, reversed, and the judgment of the Court of Review prohibited and restrained the defendant from using in future the trademark, and condemned him to pay \$400 damages.

Judgment reversed.

Butler for plaintiff.

Abbott & Co. for defendant.

Present : — Justices JOHNSON, MACKAY, and RAINVILLE.

GAUTHIER v. BERGEVIN.

Election Expenses—When Statement Need not be filed.

Held, that the penalty enacted by Sect. 286 of the Quebec Act, 38 Vict., c. 7, for failure to deliver a statement of the expenses of the election, is not incurred where there has been no expenditure of money at the election.

Judgment confirmed.

Lareau & Lebeuf for plaintiff.

L. A. Jetté, Counsel.

Duranceau & Seers for defendant.

Montreal, Dec. 29th, 1877.

Present :—JOHNSON, MACKAY, and RAINVILLE, JJ.

ST. LOUIS V. SHAW; and E. CONTRA.

Liability of Builders—Effects of Frost.

Held, that a builder is liable for damage occasioned to his work by frost, if he agreed to execute the work at a season when it was liable to injury from that cause.

The defendant, Shaw, complained of a judgment by which he had been condemned to pay a certain amount under a contract for the erection of a store on Craig street.

MACKAY, J., said the judgment must be reversed. The work done by plaintiff was injured by frost to such an extent that it was necessary to take down a wall and rebuild it. The plaintiff was bound to protect his works against frost, but did not do so, and they became valueless.

JOHNSON, J. The principle was this: A man undertook a voluntary contract with another, and the work was to be done at a season when he and all persons should have known best the difficulty of doing it. To build solid masonry

in the extreme temperature of the winter was certainly a hazardous undertaking. But the plaintiff undertook to do the work, and must be held to all the accountability imposed by the law. The protest which he had put in subsequently was absurd, and could have no effect.

RAINVILLE, J., dissented.

Judgment reversed.

Loranger & Co. for plaintiffs.

Kerr & Co. for defendant.

WATSON v. GRANT.

Insolvency—Buying Goods on credit with intent to defraud.

Held, that in a judgment ordering the imprisonment of the defendant, under s. 136, Insolvent Act of 1875, it is not necessary to specify the particular offence for which defendant is imprisoned, though several separate acts were alleged.—(See *Caldwell and Macfarlane*, ante p. 4.)

The action was brought under the 136th section of the Insolvent Act of 1875, to recover from the defendant a large sum of money, and to have him imprisoned for fraud in having obtained credit while he knew himself to be insolvent.

JOHNSON, J. There were grounds of fact and also grounds of form urged by the defendant for invalidating the judgment of Mr. Justice Papineau, which condemned him to pay \$851.83, and to six months' imprisonment, unless it was sooner paid. The grounds of fact relate to the knowledge which the defendant may have had of his insolvency. We all think the case is a bad one for the defendant, and we see nothing to mitigate it. It was mentioned that though the amendment of 1877 only required that the defendant should have probable cause for believing himself insolvent, the old law applicable to this case required a positive knowledge on his part. It does not seem to me that this amendment has very seriously altered the position of an insolvent debtor who gets credit; but it was mentioned only as affecting the grounds or reasons of the judgment; not the judgment itself; but in looking at the judgment itself we see that it imputes knowledge and belief under the old law which governs this case, and, therefore, the *motif* of the judgment is good. Then, as to the form, it was contended that as the declaration set up a great number of separate acts, and concluded generally, the

judgment should have specified which offence he was imprisoned for. That doctrine may do very well to apply to penalties, but no penalty is asked for here. The imprisonment is in the nature of a *contrainte par corps*—mitigated by the Insolvent Act to two years instead of enduring until payment of the debt. A case of *Caldwell and Macfarlane* was cited; but since the argument that case has been reversed in appeal. In looking at this section of the Act, and considering how to apply it, we must have strong and reasonable grounds for saying that this defendant knew or believed himself to be unable to meet his engagements, and concealed the fact from his creditor with intent to defraud him. He was asked whether he had endorsed accommodation paper. He positively denied it. He certainly must have known whether he had or had not; and if he had, as there is certain proof that he had, the denying it is surely a sufficient concealing from his creditor; and if the intent to defraud is not to be inferred from falsehood, it would be difficult to say when or how it can be held to exist. The unanimous opinion of the Court is to confirm the judgment, and it is confirmed accordingly.

Geaffrion & Co. for plaintiff.

Robertson & Co. for defendant.

SUPERIOR COURT.

DUNKIN, J.

Sweetsburg (Bedford District),
January 18th, 1878.

Ex parte McWilliams, petitioner for *Habeas Corpus*.

Quebec License Act—District Magistrate—Jurisdiction—Amount of Penalty.

Held, 1. That a prosecution under the Quebec License Act may be brought in any district, if the offence has been committed on board of any steamboat or other vessel.

2. Such prosecution may be brought before a District Magistrate at places within his district, other than those where a Magistrate's Court has been established.

3. Under the Act of 1875 (*Que.*, 39 Vic., c. 6, ss. 20 & 21) the penalty for unlicensed retailing of spirituous liquors is \$75.

The written opinion of the Judge (for a copy of which we are indebted to the courtesy of Mr. O. N. E. Boucher, N.P.) fully explains the points in issue.

DUNKIN, J. The petitioner rests his applica-

tion on what may be stated as these three several grounds:—

1. That the commitment recites his alleged offence, viz., the "having, at a place called Knowlton's Landing, in the township of Potton, in the said district of Bedford, * * * retailed and bartered and vended certain spirituous liquors, to wit, about three half-pints of gin in a bottle, on board of that certain steamboat called *Minnie*, on Lake Memphremagog, at the wharf on said lake at Knowlton's Landing aforesaid, * * * without having previously obtained the license required by the statutes in such case made and provided, and contrary to the statutes in such case made and provided,"—as not having been committed in the district of Bedford, and therefore as not falling within the local jurisdiction of the District Magistrate for that district, by whom it is issued.

2. That it purports to be issued, and to rest, upon a conviction rendered here at Sweetsburg,—where the District Magistrate (as the petitioner contends) could exercise no jurisdiction to that end.

3. That it recites the conviction as for a penalty of \$75, being in excess (as he contends) of the amount limited by law.

As to the first of these grounds, it is enough to say that section 155 of the License Act (*Que.*, 34 Vic., c. 2) is express, that any prosecution under it may be "brought within any district whatever, if the offence has been committed on board of any steamboat or other vessel." It may perhaps admit of question whether the word "district" here means a revenue district under the interpretation clause (s. 196) of the Act, or a judicial district, as the immediate context of section 155 would rather import. But, for the point here pending, the distinction is practically immaterial. The intention of the law clearly was to bring the offence of sale on board of any vessel under jurisdiction anywhere. This commitment declares the offence here in question to have been committed at Knowlton's Landing in this district. It goes on to say it was committed on board a steamboat at a wharf there. I cannot here gratuitously assume that a steamboat at a wharf laid as in this District, was not in the District. And even if I could, I should yet have to hold,—whether I took the strictest letter, or simply the plain intention, of this section 155—that this prose-

cution was one that might be brought in this District, as it has been.

As his second ground of objection, the petitioner contends, that prosecutions of this class can be well brought before a District Magistrate, at those places only within his District where a Magistrate's Court has been established; cannot be well brought before him here, at Sweetsburgh.

Under the provincial Statutes on this subject, every District Magistrate has all the civil powers (or it might possibly be better to say, all the non-criminal powers) of any one or more Justices of the Peace, or any Judge of Sessions of the Peace. And not being limited as to these to any particular localities, "he may appoint in the different localities within the limits of his jurisdiction, as many clerks * * and as many constables as he may require." (*Que.* 32 Vic. c. 23, ss. 2 & 6.)

Under Dominion legislation, he has extensive criminal powers also; some, but not all, of which can only be exercised at the *chef-lieu* of his District.

Besides all this, he further holds what is distinctively called a "Magistrate's Court" in certain places, with a jurisdiction partly peculiar to itself, and partly not. As one matter of such jurisdiction, the District Magistrates' Act (*Que.* c. 23, s. 15, sub. 3) specified suits for penalties under the then laws regulative of Licenses in the Province. But this specification was not so made as to exclude any of the various jurisdictions then subsisting as to them. On the contrary, the License Amendment Act of the same year (*Que.* 32 Vic., c. 24, s. 4.) makes explicit provision with reference to such suits whenever "brought before any Judge of the Sessions of the Peace, Recorder or District Magistrate," or "before any two other Justices of the Peace." It is clear, therefore, that the Legislature then took for granted, that although jurisdiction was specially given to the Magistrate's Court, it attached also, (and equally) to the District Magistrate personally. This state of the law, it is true, has been amended since, as regards suits under what are now the License laws of the Province; but it has been so, in a sense that is even unfavourable to the pretension of the Petitioner. By section 152 of the License Act, (*Que.* 34 Vic., c. 2.) in default of other express provision for the special case, suits under that

Act, if involving more than \$100, are to be brought in the Circuit or Superior Court, and if for less, then "before two Justices of the Peace for the District, or a Judge of the Sessions of the Peace, or a Recorder or a Police Magistrate, or a District Magistrate, or (except in the Districts of Quebec and Montreal) before the Sheriff of the District." The Magistrate's Court jurisdiction (as contradistinguished from that of the District Magistrate personally) over this class of cases,—originally given by the Act of the year before,—is thus in effect cut off. And I fail to find any indication that it has since been again given.

His Magistrate's Court jurisdiction he can of course exercise only at the places fixed for his holding of that Court. An important part of his other or personal jurisdiction, he can only exercise at this place. I fail to see that there is any part of it that he can only exercise elsewhere than at this place.

There remains the third ground; that the commitment is bad, because the fine of \$75 is excessive.

In 1870, by the License Act, (*Que.* 34 Vic., c. 2, s. 2,) the penalty for the retailing of liquor by or under sufferance of "any person," "in his house or premises, or in his boat, barge, craft, or other construction, floating or moored in any river, lake or stream, or in any house, shanty, hut, or other building, erected upon any frozen water, without the license required by this Act, or contrary to its true intent and meaning," was fixed (within the organised parts of the Province) at \$50, and (beyond them) at \$25. By section 6 of the same Act, the penalty, as against the "owner, master, or person in charge of a steamboat or vessel," for retail of liquor by him or under his sufferance, "on board such steamboat or vessel, without having previously obtained a license," was (somewhat unnecessarily—unless perhaps as regarded any such possible offence beyond the organised parts of the Province) fixed at \$50. And under the head of "obligations and restrictions on persons licensed," it was further provided by the same Act, (s. 34) that "the owner, master, or person in charge of any steamboat or vessel," allowing the sale of liquor on board "during the time the same shall be laid up in winter," shall incur a penalty of \$40, "notwithstanding

his having obtained a license under this Act," (*" bien qu'il ait eu une licence sous l'autorité de cet Acte."*)

In 1874, by the then amending Act, (*Que. 37 Vic., c. 3, s. 1*) all the words relative to place of sale were struck out of section 2 of the Act of 1870; so that it has ever since stood, as simply imposing its penalties on the act done by any one anywhere, whether on land or water.

In February, 1875, by a further amending Act, (*Que. 38 Vic., c. 5, s. 7*) a sub-section was added to section 34 of the Act of 1870, to the effect that such owner, master, or person in charge, allowing sale of liquor "on board of such steamboat or vessel while it remains at any port or stopping place, wharf or other place of discharge," shall incur the penalty of \$40,—as before provided by that section, with regard to the vessel at winter quarters; the English version closing with the words, "whether they have a license under this Act or not;" and the French version, with words closely following those of the older sub-section, as already quoted, "*bien qu'il ait eu une licence sous l'autorité du présent Acte.*"

In December, 1875, by a still further amending Act (*Que., 39 Vic., c. 6, ss. 20 and 21*), the penalties under section 2 of the Act of 1870 were raised—the one from \$50 to \$75, the other from \$25 to \$35; and the penalty under section 6 of the same Act was raised from \$50 to \$75.

The petitioner contends that the true reading of the subsection thus added in February, 1875, to section 34 of the Act of 1870, is that given by the English version, and that the subsection therefore operates an indirect repeal of section 6 (as so amended) in respect of the case of liquor sold on board a vessel while at a "port or stopping place, wharf or other place of discharge," limiting its operation, in fact, to the case of a vessel without license and at the moment of the sale actually under way.

I cannot take this view. My duty, where the two versions of an Act differ in sense, is to do my best to gather from them the true intent and meaning of the Legislature. In this instance, I am satisfied that such true intent and meaning are to be found in the language of the French version; and that the English, in so far as it varies from the French, must be held for a mere mistranslation. The French version alone fits in with the context of the Act as

amended—as also with the history of the amendments of the Act, taken as a whole. The English version, so viewed, is a *non sens*—a reading the Legislature cannot have intended. Even had the French run with it, I must have seriously doubted as to their sufficiency, together, to control the concurrent sense of sections 2 and 6. As it is, I have no doubt. The \$75 penalty, established by those sections as amended in December, 1875, is the penalty settled by law for this case.

The petitioner fails, therefore, to make out a case for the issue of the writ, and can take nothing by his petition.

S. W. Foster and W. W. Lynch for petitioner.
E. Racicot for the revenue officer.

CURRENT EVENTS

ENGLAND.

THE SUITS AGAINST THE JUDGES.—The *Times* announces the end of a persevering litigant. On Jan. 12, in the Supreme Court, when the case of *Cobbett v. Lopes*—one of the numerous actions brought by Cobbett against various Judges for supposed misconduct with regard to the claimant in the Tichborne case—was called, Mr. Muir Mackenzie, for the defendant, mentioned the fact that Mr. Cobbett, on his way to the Court that morning, had fallen down dead suddenly in the lobby of the House of Lords. The case was postponed.

The London *Telegraph* says of the deceased (a son of the historian):—"The name of this aged and eccentric gentleman, for many years past has been a kind of household word in Westminster Hall, owing to his persistency in bringing futile actions and pestering the Judges with trivial applications, and on Saturday he was making his way through the central lobby of the House of Parliament, toward one of the Lords' committee rooms, where he was bent on prosecuting an appeal before the Lords Justices in the phantom action of '*Cobbett v. Lopes*,' when he was seen to stagger and fall. Assistance was promptly rendered, but it was in vain. He had died on the scene which for many years had been his field of battle. In the Queen's Bench and the Common Pleas, in the Exchequer and the now defunct Bail Court, the contentious William Cobbett's more contentious son,

had, during more than a quarter of a century, waged fierce but fruitless war. He always conducted his own case—unless, indeed, Mrs. Cobbett was good enough to move the court for him—for bold would have been the barrister who consented to hold a brief for a plaintiff who habitually fought with shadows, and was accustomed to make his giants first before he tried to slay them. For some years Mr. Cobbett lay, mainly through his own choice, in the Queen's Bench Prison; and his delight was then to bring actions on all kinds of occult grounds, against the Governor and the Deputy-Governor. A writ of Habeas Corpus could in those days be obtained for the moderate sum of two pounds ten shillings; and it was rarely indeed that, in the course of a term, Mr. Cobbett did not indulge himself with one or two of these little legal luxuries, for the purpose of being brought up to Westminster, and moving for something against somebody. We always return to our first loves; and in the evening of his life the litigious patriarch reverted to his earliest passion for the Palladium of our liberties. The case of '*Cobbett v. Lopes*,' a record now withdrawn forever, was only one of a series of suits which this indefatigable plaintiff had brought against Her Majesty's Judges in connection with an attempt on his part to obtain the release of the 'unhappy nobleman,' lately 'languiſhing at Dartmoor,' but now seemingly getting on very nicely at Portland (the Tichborne claimant) on a writ of Habeas Corpus. Mr. Cobbett was very well known to the judicial bench—as well, indeed, as crazy Miss Flyte and the aggrieved 'Man from Shropshire' in 'Bleak House' must have been known to the Lord Chancellor. But poor Mr. Cobbett will tease the court no more, and the Great Hall of Pleas will lose one of its most constant visitors. Its analogue in the French Palais de Justice is called '*La Salle des Pas Perdus*.' How many thousands of footsteps must not old Mr. Cobbett have utterly squandered and wasted in Westminster Hall!"

CODIFICATION OF THE CRIMINAL LAW.—The Speech from the Throne at the opening of Parliament, contains the following important paragraph:—

"Among other measures for the amendment of the law, a bill will be laid before you to sim-

plify and express in one act the whole law and procedure relating to indictable offenses."

It has been rumored for some time that it was the intention of the Lord Chancellor to bring in a bill of this nature.

UNITED STATES.

COMMON CARRIER.—The Supreme Court in the case of *Pratt v. Grand Trunk R.R. Co.*, has had under consideration the question of what will amount to a delivery by an intermediate carrier to a succeeding carrier, sufficient to discharge the former from further responsibility. The opinion of the Court was delivered by Hunt, J., as follows:—

"The defendant is a corporation engaged, as a common carrier, in the transportation of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis, and carried over its road from Montreal to Detroit. The goods reached the city of Detroit on the 17th of October, 1865, and, on the night of the 18th of the same month, were destroyed by fire.

"The defendant claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from the liability before the occurrence of the fire.

"If the liability of the succeeding carrier had attached, the liability of the defendant was discharged. *Ransom v. Holland*, 59 N. Y. 611; *O'Neil v. N. Y. C. R. R. Co.*, 60 id. 138.

"The question, therefore, is: Had the duty of the succeeding carrier commenced, when the goods were burned?

"The liability of a carrier commences when the goods are delivered to him, or his authorized agent, for transportation, and are accepted. *Rogers v. Wheeler*, 52 N. Y. 262; *Grovesnor v. N. Y. C. R. R. Co.*, 59 id. 34.

"If a common carrier agrees that property intended for transportation by him may be deposited at a particular place, without express notice to him, such deposit amounts to notice, and is a delivery. *Merriam v. Hartford R. R. Co.*, 24 Conn. 354; *Converse v. N. & N. Y. Tr. Co.*, 33 id. 166.

"The liability of the carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever the pro-

perty thus comes into his possession with his assent. *Illinois R. R. Co. v. Smyser*, 38 Ill. 354.

"If the deposit of the goods is a mere accessory to the carriage,—that is, if they are deposited for the purpose of being carried, without further orders,—the responsibility of the carrier begins from the time they are received; but, when they are subject to the further order of the owner, the case is otherwise. *Laders v. Griffith*, 25 N. Y. 364; *Blossom v. Griffin*, 13 id. 569; *Wade v. Wheeler*, 47 id. 658; *Michigan R. R. v. Shurtz*, 7 Mich. 515.

"The same proposition is stated in a different form, when it is said that the liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation, and an acceptance by him. Authorities *supra*.

"The precise facts upon which the question here arises are as follows: At the time the fire occurred, the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the centre of the building, upon which cars were run into the building, to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road, or were delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employes of the Michigan Central Railroad Company; for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unload-

ing from defendant's cars, deposited by said employes of the Michigan Central Railroad Company, in a certain place in said section from which they were loaded into the cars of said latter company, by said employes, when they were ready to receive them; and, after they were so placed, the defendant's employes did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill, in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company, for the transportation of said goods over its line of railway, and not before.

"These goods were, on the 17th of October, 1865, taken from the cars, and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

"At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking-clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking-clerk, in the manner aforesaid, the place of destination, and a list of said goods, and the amount of accumulated charges, and to collect

the same, together with its own charges, of the connecting carrier.

"We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated.

"1. They were placed within the control of the agents of the Michigan Company.

"2. They were deposited by the one party, and received by the other, for transportation, the deposit being an accessory merely to such transportation.

"3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company.

"4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, "P. & F., St. Louis," were sufficient notice that they were there for transportation over the Michigan road, toward the city of St. Louis, and such was the understanding of both parties.

"The cases heretofore cited in 20th Conn. 354, and 33 id. 168, are strong authorities upon the point last stated.

"In the latter case, a railroad company and a steamboat company had a covered wharf in common, at their common terminus, used as a depot and a wharf, and it was the established usage for the steamboat company to land goods for the railroad, on the arrival of its boats in the night, upon a particular place in the depot, whence they were taken by the railroad company at its convenience, for further transportation, both companies having equal possession of the depot. There was no evidence of an actual agreement that the goods deposited were in the possession of the railroad company, and the goods in question had not been in the manual possession of the railroad company when they were destroyed by fire on the Sunday afternoon following their deposit on the previous night. It was held that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad should take it thence at their convenience. The delivery to

the succeeding carrier was held to be complete, and a recovery against the first carrier for the loss of the goods was reversed.

"*Merriam v. Hartford E. R. Co.*, 20 Conn. 355, it was held, that, if a common carrier agree that property intended for transportation by him may be deposited at a particular place without express notice to him, such a deposit alone is a sufficient delivery; and that such an agreement may be shown by a constant practice and usage so to receive property without special notice.

"The plaintiff contends that the goods were not in the custody and under the control of the Michigan road, for the reason that the case states that they 'are in a section of the freight depot set apart for the use of the defendant.' This is not an accurate statement of the position. The expression quoted is used incidentally in stating that when the agent of the Michigan road saw 'goods deposited in the section of the freight building set apart for the use of the defendant, destined on the line of said Central Railroad, he would call upon the agent of defendant, and from a way-bill,' obtain a list of the goods and their destination. Just how and in what manner it was thus set apart appears from the facts already recited. It was a portion of the freight-house of the Michigan company, in which a precise spot was selected or set apart where the defendant might deposit goods brought on its road, and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan company, and to be loaded on to its cars, at its convenience, without further orders from the defendant.

"We are of the opinion that the ruling and direction of the circuit judge, that, upon the facts stated, the defendant was entitled to a verdict and judgment in its favor, was correct, and the judgment should be affirmed."

—Coroners usually enjoy sublime visions of their importance and powers; but sometimes they are baffled. James Higgins, a workman, fell into a blast furnace at South Stockton, Eng., a short time since, and his body was almost instantly consumed. A coroner was summoned, but no inquest took place, as there were no remains to view.

RECENT ENGLISH DECISIONS.

Master and Servant.—1. The defendant's servant, with his master's horse and waggon, was employed to take out beer for defendant to customers, and on his way home he called for empty casks, for which on delivery to his master he received a penny a piece. On March 5th, 1875, he took the horse and waggon, without his master's knowledge, and carried a child's coffin to a relative's house. On his way home he picked up a couple of empty casks, and subsequently negligently came in contact with the plaintiff's cab, and damaged it. On his arrival home, he received his usual fee for the empty casks.—*Held*, that he was not in the discharge of his ordinary duties, when the injury happened, and the master was not liable.—*Rayner v. Mitchell*, 2 C. P. D. 357.

2. The plaintiff was employed by a contractor engaged by the defendants to do certain work on their road, in a dark tunnel on a curve, where trains were passing at full speed without any signal every ten minutes, and the workmen could not know of the approach of the train until it was within thirty yards of them. There was just room enough between the rail and the wall for the men to get out of the way. No look-out was stationed, though it appeared that on a previous occasion, when repairs were going on, there had been one. Plaintiff had worked in this place a fortnight, and while reaching out across the track for a tool, he was struck and hurt by defendant's train. The jury found negligence, and awarded £300 damages. *Held*, on appeal (Mellish and Bagallay, L. JJ., dissenting), reversing the decision of the Court of Exchequer, that the plaintiff must be held to have been aware of the extraordinary risk he was running, and the defendants were not liable for injury resulting from his voluntary exposure. *Woodley v. The Metropolitan District Railway Co.*, 2 Ex. D. 384.

Negligence.—1. The defendant, Cox, was the owner of premises on which he contracted with the other defendants to build a house. The outside of the house was finished, and the scaffolding which had been erected to protect the public on the sidewalk had been taken down. The servant of a sub-contractor employed to plaster the interior, moved a tool too near the edge of a plank before an open window, and the tool fell

out and hurt the defendant passing under. The jury found that the scaffolding was properly removed, but found the defendant contractors negligent in not putting up some other protection, and found for the plaintiff. *Held*, that the defendants were not liable, the accident not being one which they could have foreseen. *Seem* that, if anybody, the sub-contractor was liable.—*Pearsons v. Cox et al.*, 2 C. P. D. 369.

2. The plaintiff, a waterman looking for work, saw a barge belonging to defendant being unlawfully navigated on the Thames, by one man alone, and remonstrated with the man in charge of it, hoping thereby to be employed to assist. The latter referred him to defendant's foreman, and plaintiff went to defendant's wharf about the matter. While there, a bale of goods fell upon him through the negligence of defendant's servants, and injured him. *Held*, that the plaintiff could maintain an action for injuries.—*White v. France*, 2 C. P. D. 308.

Practice.—In an indictment for publishing an obscene book, the title only was set forth. The jury found the book obscene, and the defendants moved to quash the indictment or to arrest judgment, on the ground that the exact words relied on, that is, the whole book, should have been set forth. Motion refused, with an intimation that the point being a doubtful one, might, however, well be taken in error.—*The Queen v. Bradlaugh and Besant*, 2 Q. B. D. 569.

GENERAL NOTES.

THE NEW LEGAL SYSTEM IN IRELAND.—The High Court of Justice sat for the first time in Dublin on the 11th January. The name "Four Courts" disappears now, and it is believed the new arrangements will cause a good deal of business to be done in the country which was formerly transacted in Dublin. Under the altered plans the present puisne common law judges will receive £3,800 a year, instead of £3,725 and £3,688, but their successors will have only £3,500. The Lord Chief Justice will receive £5,074, and the Chief Justice of the Common Pleas and the Chief Baron each £4,612, but the future Lord Chief Justice will receive only £5,000, and the other two chiefs £4,600. When the scheme is in full operation the salaries of the eighteen paid judges will be £72,000 a year.

The Legal News.

VOL. I. FEBRUARY 16, 1878. No. 7.

DISSENTIENT OPINIONS.

The view is strongly expressed by a Toronto contemporary that the opinions of Judges of the Supreme Court who differ from the majority should not be reported, should not even be stated in court,—nay more, that the very names of the dissentient Judges should be suppressed. The advantages of unanimity are manifold, and the profession are in a position to appreciate them at their just worth. But we must take care that unanimity, or rather the semblance of unanimity, is not purchased at too high a rate. We shall quote part of the article to show the reasoning by which the proposition is supported :

"It is evident that one good end which would result from the suppression of dissentient opinions would be the reduction in bulk to that extent of the yearly volumes of the Reports. A very much overruled judge might then imitate the example of the Pennsylvania justice, who published at his own charges, in a volume by themselves, his own dissenting judgments, and so sought redress at the hands of posterity. It is further evident that if the reporters do their duty, and give a proper synopsis of the arguments of the opposing counsel, it is unnecessary to set forth the grounds of dissent on the part of any of the judges. Any attentive student of the case will see where doubts may arise. But when a judge has fully combatted his brethren in the conference room, and been voted down, it is better that his reasons for withholding assent should not be reported, so as to cast disrespect on the considered judgment of Courts of last resort. We think we speak advisedly when we say that the little weight possessed by decisions of Lower Canada Courts is partly owing to the diverse views entertained and expressed by the different judges who take part in the disposition of the case. Much better to suppress the disagreement and not to give prominence to it by publishing *in extenso* all that can be said against the opinion of the majority. As in family matters, if there be disturbances, better not aggravate the trouble by taking the public into your confidence. When Mr. Justice Maule, according to the well-known story, gave judgment, after Judge A. and Judge B. had just delivered conflicting opinions, by saying that he agreed with his brother B., for the reasons given by his brother A., he never intended that the views of the Court should be published for the benefit of the profession, or the confusion of suitors.

"The object of all decisions is to settle the law—to determine the just rule fitted to the existing state of things, and it is most important that the conclusion

should be reached with such precision and unanimity, as not to provoke litigation. In the Court of final appeal for this Dominion, we think that the ancient customs of the Privy Council, and the well-considered practice of the Supreme Court of the United States, may well be recognised and adopted. The opinion of the Court should be composed and delivered by one member, and no dissenting judgment should be pronounced or reported."

The gratuitous sneer at the decisions of "Lower Canada" Courts may pass. A Bench which has been adorned by men like Sir James Stuart, Sir Louis Lafontaine, Sir A. A. Dorian, Aylwin, Badgley, Meredith, and others still holding office, needs no apologist. The opinions of the Quebec Bench have invariably been treated with respect by their Lordships of the Judicial Committee of the Privy Council, and in very few of the 2,113 cases heard and decided on the merits by the highest Provincial Court during the last sixteen years, have the judgments been set aside on appeal to England, as the reports of the Privy Council show. If the judgments of Quebec Courts are not appreciated or cited at Toronto, the reasons are probably the same as account for the fact that, while the decisions of English and United States Courts are constantly referred to at Montreal or Quebec, it has been a rare event to hear a reference to the opinion of an Ontario Judge in the latter cities.

But the question of present moment is this : Ought the opinions and the names of dissentient Judges to be withheld ? The example of the Judicial Committee is referred to by our contemporary, as one to be imitated. It is true that the opinions of the minority of the Judicial Committee are withheld. But there is a special reason for this. The decision of the Judicial Committee is in the form of a recommendation to Her Majesty by certain members of Her Privy Council, and falls within the same rule and etiquette as other business before the Privy Council. Now that the work of the Judicial Committee is performed by paid judges, and the Committee has become very much like other Courts of Appeal, there is an element of fiction in the form, still retained, of presenting the decision as a recommendation to Her Majesty, and it may possibly in time be abandoned. At all events, there is good reason to believe that the suppression of dissentient opinions has proved highly inconvenient in several cases, and probably accounts for the

unsatisfactory nature of some of the judgments of this tribunal, in passing over important issues on which both parties desired an opinion, the generally accepted explanation being that it was impossible to reconcile the views of the Committee on such points.

Then, again, the practice of the Supreme Court of the United States is referred to, where the names of the dissentients are mentioned and no more. If the fact of a dissent is expressed at all, we think it follows that the grounds should be briefly stated, for the dissent might apply to only a small part of the case, and the announcement of a dissent generally would mislead. The point to which the dissent refers should at least be given, and we have already intimated our opinion (*ante*, p. 2) that very little more is desirable in any Court whatever.

It is said, "if reporters do their duty, and give a proper synopsis of the arguments of the opposing counsel, it is unnecessary to set forth the grounds of dissent on the part of any of the judges." This argument will not bear scrutiny. The dissent may be based on any one of half a dozen points raised at the bar,—indeed we have sometimes heard it confined to a point entirely novel. Why should the reader of the report be left to so doubtful a source of information? Would not the argument of counsel on the other side be equally explicit as to the views of the majority?

The main objections to the suppression of the dissent seem to us to be these: Such an ostrich-like proceeding would be a deception in itself, it would be an injustice to the Judges who are unable to concur in the decision of the majority, and it would tend to retard and affect injuriously the growth of the science of jurisprudence, and its progress towards perfection. The reasons which appear to us to sustain this view may be more conveniently stated in our next issue.

The advocates of woman's rights are not idle. A bill has been introduced in the U. S. House of Representatives, providing that women should be admitted to practise in all the Federal Courts; and by a bill before the N. Y. Assembly, it is proposed to enable married women to contract in the same manner as if single.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, December 29, 1877.

JOHNSON, J.

THE WINDSOR HOTEL CO. v. MURPHY.

Corporation—Alleged Forfeiture of Charter.

JOHNSON, J. The plaintiff is a corporation by statute of the Province of Quebec, and sues the defendant to recover \$400, being the sixth, seventh, eighth and ninth calls upon the stock he had taken in the concern, on which the first five calls have already been paid. The defendant pleaded first by exception to the form, that he was not a shareholder in the corporation as described; that he had taken stock in a company with the same name which, however, had forfeited its charter and had ceased to exist, the preliminary conditions of the act of incorporation not having been duly observed or complied with. The specific grounds upon which this pretension is set up by the defendant are that the company has not opened and kept the necessary books containing the names and addresses of the directors, and the dates at which they became, or ceased to be, so; that some of the directors have not paid their calls; and that the \$400,000 mentioned in the 5th section of the act of incorporation, and the \$40,000 of it that ought to have been actually deposited in some chartered bank had neither been subscribed, nor deposited. The defendant also set up that before the necessary number and amount of shares had been subscribed, and the required amount paid in, directors were elected in violation of the act; and that the meeting of shareholders for the election of directors, being called by the provisional direction, was illegal, and the subsequent acts of the directors were void. There was an amendment made to the declaration after the production of this *exception à la forme*, and it was made for the purpose of setting up the right of the plaintiff to recover under the provisions of the "Joint Stock Companies' General Clauses Act." The plaintiff contended at the hearing that the exception as to form having been taken before the amendment, did not apply to the declaration as now amended; but that, I think, is a mistake, as the exception attacks what still remains independently of the amendment; but really it is.

not a matter of substantial importance, as the subsequent pleas raise precisely the same points. It struck me, when the case came on, that the pretensions of the defendant were quite untenable, and I only allowed evidence of the facts under reserve of the point of the law, whether all that was set up constituted a defence to the action; and a certain proof was made by parole testimony which, even admitting it to the fullest extent, does not by any means prove the facts alleged; but on the contrary fairly disproves them. I do not therefore think it necessary now to go elaborately into the question on which my opinion has not changed since the argument. It must be observed that the defendant's pleas asked for the dismissal of the action on the ground that the company or corporation in question was extinct, and its charter and powers forfeited. The *exception à la forme* was not then before me; the inscription did not reach it; therefore I said then, as I say now, that I have no power, sitting here, to say that a public statute incorporating the plaintiff is to have no effect; and some act of forfeiture ought to be proved under the special laws relating to this subject. I said further that in a suit by a corporation against one of its shareholders for calls due on his stock, it is no answer on his part to say that the corporation is non-existent, if no such proceedings have been taken. It exists in relation to all its members until it has been dissolved by judgment of a competent court. I asked for authority, and was told I should be furnished with authorities against my opinion; but not only are none forthcoming, but, as the defendant's counsel must know, there is an accumulation of direct decisions against him. I have had a list of them before me, and have referred to them to satisfy myself that I was right; and while I was occupied on the subject, I found a case directly in point decided in our own courts. It is a case of *The Connecticut and Passumpsic Rivers Railroad Co. v. Comstock*, in which many points were settled, and among them, this one in particular. It was decided by Judges Caron, Drummond, Badgley, and Monk. A case was referred to by the defendant's counsel—a case of *The Union Navigation Company v. Couillard* (21 L. C. J. 70); but there, it was only held that a subscriber to a company to be incorporated by letters patent; but who never subscribed

nor paid calls after incorporation, is not liable for calls. There is an obvious and essential difference between the two cases. That was an incorporation under the Joint Stock Companies' Incorporation Act (31 Vic. c. 25). The subscriber was misled, and induced to subscribe for stock upon false representations, and the prevailing motive and consideration of the subscription proved unfounded. Here there is nothing of that kind. The 5th section, which is relied on by the defendant, did not operate as a forfeiture, if its provisions were not fulfilled; it only operated as invalidating the proceedings, such as meetings, &c., which should take place contrary to the directions of that section. Therefore, it seemed important that the *exception à la forme* should be properly before the Court, for though the defendant could not ask that the action should be forever dismissed under a forfeiture of the charter that had never been adjudged upon, I would not be prepared to say that he could not ask that the demand *quant à présent* should be stayed, if the proceedings under which these calls have been made were irregular. On that, however, I do not now pronounce; 1st. Because I hold the proof is insufficient; and 2ndly. The preliminary plea only asks for the dismissal of the action for the present, on the ground of an extinction and forfeiture of the charter, which, if true, would deprive the plaintiff of any right of action whatever; and, therefore, it is not properly the subject of a preliminary plea, but is a plea *en fond*. Again, this defendant has paid five calls already, which constitutes an acquiescence as to their being due (for the only ground on which payment was objected to was that these alleged irregularities of the proceedings had extinguished the charter, which is not the case.) The nineteenth section of the joint stock companies' general clauses act, which by one of its provisions is made part of every such charter as this, provides that the certificate of the officer (which is produced) shall be sufficient to entitle the plaintiff to judgment. Judgment, therefore, goes for plaintiff for the amount demanded. There being no motion to reject the evidence, I take it as evidence by consent.

Judgment for plaintiff.

Abbott & Co., for plaintiff.

Louise & Co., for defendant.

BANK OF MONTREAL v. THOMSON.*Corporation, Endorsement of Note by.*

JOHNSON, J. This is an action by the holder against the maker of a promissory note, and the plea is that the endorsement by the Windsor Hotel Company, who were the payees, was ineffectual on the same grounds that have just been discussed in the case against Murphy for calls. The power to endorse notes is given by section 31 of the joint stock companies' general clauses act, and has been exercised as there prescribed. The validity of the exercise by the Windsor Hotel Company of this power to endorse is attacked on the same grounds as the validity of the calls was questioned in the other case, by alleging the forfeiture of the charter, only here it is done by exception *au fond* instead of to the form; and on the grounds that have just been explained there the pleas are dismissed and judgment is given for plaintiffs.

Judgment for plaintiffs.

Dunlop & Lyman, for plaintiffs.

Doude & Co., for defendant.

FARRELL v. RITCHIE et al.*Broker—Purchase of Shares—Delivery.*

JOHNSON, J. The plaintiff brings his action against the defendants—a firm of brokers—to recover \$112.50 and interest and costs. He employed them to purchase for him fifty shares of the stock of the Royal Canadian Insurance Company, and they sent him, on the 12th of February, the broker's note for the price, \$100, and the brokerage, \$12.50 more, and a memorandum at the foot: "Terms, cash; 13th inst." The plaintiff paid them the whole amount on the 13th February; but they did not transfer the stock to him; and on the 22nd of March they were written to by the plaintiff's attorneys to pay back the money in default of the transfer; and again, on the 4th of May, to the same effect. Their plea to the action is that there was a call of five per cent. on the stock made on the 12th, and notified on the 13th, and payable on the 15th May; and all transfers were subject to this call, and could not be made without payment; of all which they notified the plaintiff, and he requested them to carry it for him till the 15th of May, which, however, they refused to do, and repeatedly asked him to pay the call. On the 16th of May, finding that

the stock was getting lower in the market, they notified him to pay up at once, or they would sell at his cost and charges, and hold him liable for all loss. That in consequence they sold the stock at a loss; and reserving their right to recover this loss, they ask for the dismissal of the action. There is a letter from Farrell to the defendants of the 20th of March, which, I think, seriously affects the case. I had, in fact, expressed my opinion to that effect when I was induced to take the case back on the representation that there was no proof of the letter. It is now proved, however, and I must look at the transaction by the light thrown on it by that letter. It is as follows:—

"MY DEAR RITCHIE—I paid \$112.50 on 50 shares of Royal Canadian Insurance Co., and which we afterwards found could not be transferred until 15th May. Please apply this amount on the 25 shares Richelieu and Ontario, as it is not necessary to pay for Royal Canadian until transferred. Please let me know if this is satisfactory. I will hand you the receipt of above amount on Royal Canadian Insurance Co. when I see you.

"Yours, &c.,

"P. FARRELL"

The plaintiff in this letter plainly says that he knows the stock can't be transferred till he pays the call; that is the evident meaning of it. He asks for his money back because the defendants have made default to deliver the stock; but that is unfounded in point of fact. There is no default of the defendants. They have done all they were employed to do. He can only ask for the money, because he did not get the stock. He can't have both. The defendants were employed as brokers; they were bound to deliver in the ordinary course by transfer, but they were not bound to any more onerous terms of delivery than usual, and payment of the call of 5 per cent formed no part of their contract.

Action dismissed.

Bethune & Bethune, for plaintiff.

Ritchie & Boslase, for defendants.

ROSS et al. v. MCGILLIVRAY.*Procedure—Depositions taken in short hand without consent—Acquiescence.*

JOHNSON, J., in the course of his judgment in this case (a contested action for goods sold, involving a simple question of fact), remarked:—The evidence has been taken perhaps in an irregular manner. There are no depositions

signed by the witnesses; but only notes of a short hand writer without any written consent: both parties, however, have participated in this mode of proceeding, and are bound by it.

Abbott & Co., for plaintiffs.

Laflamme & Co., for defendant.

SUPERIOR COURT IN REVIEW.

Montreal, Jan. 31, 1878.

MACKAY, TORRANCE, DORION, JJ.

In re TURGEON, Insolvent, and COUPAL, Intvg.

[From S. C. St. Francis.

Insolvent Act—Fraudulent issue of Attachment.

MACKAY, J. Jacques Turgeon made affidavit under the Insolvent Act of 1875, against his son Pierre, and an attachment issued. Coupal, a creditor of Pierre, intervened, and alleging that Pierre never was a trader, and that there was fraudulent concert between father and son, petitioned to quash the attachment. Subsequently, by an intervention, he asked the same thing for the same reasons. The intervention was contested by Jacques Turgeon, but the judgment *a quo* maintained the intervention, and declared that plaintiff had no right to sue out the attachment. This judgment must be confirmed. All that I see of the transactions between father and son were in fraud of the intervenant, and the insolvency proceedings were meant to work fraud against him and to hinder him.

Judgment confirmed.

L. C. Belanger, for intervenant.

Brooks & Co., for contestant.

MACKAY, DUNKIN, RAINVILLE, JJ.

• FAIR v. BALDWIN.

[From S. C. St. Francis.

Insolvent Act—Fraudulent Secretion.

MACKAY, J. This is an appeal from the district of St. Francis. Fair is the assignee of Lathrop & Hazeltine, insolvents. In October, 1875, the firm conceived the idea of spolling their creditors (other than their relatives); so they made away with almost all they had of value—store buildings to one relative, the stock in store to another, a valuable mortgage to defendant, uncle of Lathrop's wife. When almost naked they called a meeting of credit-

ors, at which what little remained was put into a trusteeship for the creditors, the trustee being defendant's son. The judgment is evidently right. The transfer to defendant was one of a lot of fraudulent transfers and secretions of property to cheat creditors perpetrated in the most hardy manner by the firm of Lathrop & Hazeltine, and all who took those transfers had presumably knowledge that the firm was insolvent.

Judgment confirmed.

Ives & Brown, for plaintiff.

Doak & Co., for defendant.

MACKAY, TORRANCE, DORION, JJ.

MACMASTER *et al.* v. ROBERTSON.

[From S. C. Montreal.

Insolvent Act—Art. 825 C. C. P. not repealed thereby.

MACKAY, J. The defendant, who was capiased, is now moving under Art. 825 C. C. P., furnishing sureties before the Prothonotary. Under that article he has offered bail before the Prothonotary, but the latter seems to have halted. It is opposed by plaintiffs that under sect. 127, Insolvent Act of 1875, 825 C. C. P. is repealed. We hold the contrary. The defendant has two remedies, and may pursue the one of the Code. The judgment so holding we confirm.

DORION, J. There is another reason. This is not a final judgment susceptible of revision. It is on a simple petition.

Judgment confirmed.

Davidson & Co., for plaintiffs.

L. N. Benjamin, for defendant.

MACKAY, DUNKIN, RAINVILLE, JJ.

MARTIN v. MUNICIPALITY OF TOWNSHIP OF ASCOT.

[From C. C. St. Francis.

Negligence, Contributory—Drunkenness.

MACKAY, J. The defendants have been condemned in \$200 damages suffered by plaintiff through alleged defect in a road. The declaration says that defendants were negligent in keeping up the road; that on the day of the accident plaintiff was driving a team and pedler's sleigh, and the sleigh was upset, and plaintiff's rib broken, causing him to be laid up six weeks in bed. The plea, denying these

allegations, says that the road was kept in as good a state as possible, that the overseer had shovelled there that day, and that the plaintiff was drunk. The evidence established that plaintiff was addicted to drink, and was drunk at the time of the accident. Had he been sober the accident would not have occurred. The plaintiff in his factum does not grapple with the defendants' plea of contributory negligence. The judgment complained of is reversed, and the action dismissed.

Judgment reversed.

Ives & Brown, for plaintiff.

Brooks & Co., for defendants.

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MACKAY, DUNKIN, RAINVILLE, JJ.

MONGEAU et vir v. LAROCQUE, and GIGAUT,
Petitioner.

[From S. C. St. Hyacinthe.

Insolvent Act—Assignment by Non Trader—Assigned's claim to monies rejected.

MACKAY, J. On the 11th Feb., 1875, defendant Larocque made a cession under the Insolvent Act to Gigault. At the first meeting of creditors called nobody appeared, so Gigault became assignee. It is not surprising that no creditors appeared, for Larocque was not a trader and the assignment was undoubtedly a fraud. Larocque before that had been condemned in a suit by plaintiff against him and his lands were under seizure by the Sheriff. The Sheriff's sale took place in June, 1875, and on the 28th August the Sheriff returned the writ and reported the sale. In September, 1875, several oppositions *à fin de conserver* were filed. Only on the 9th November did Gigault petition the Superior Court at St. Hyacinthe, asking for the money levied, that he as assignee might distribute it. On the 1st Feb., 1876, plaintiff presented a counter petition, alleging that Larocque never was a trader, and that the proceedings in insolvency were a fraud. Gigault answered by a general denial and insisting that the sheriff should pay him over the money. Judgment has gone against Gigault, and with reason we think. Nobody is hurt by it. Larocque is insolvent, and all he had is before the Court, and creditors more than enough to consume it all. Gigault, who might have moved in July, August, September or

October, kept inactive and did nothing, and allowed things to take their present shape, and for this reason, in addition to others, we hold that the judgment complained of ought to be confirmed. Gigault's claim is unreasonable. He seems to represent nobody but Larocque, and all Gigault's creditors are content. Upon a mere technicality Gigault would have all the proceedings going on before the Superior Court transferred to his office, and would draw all the parties now before the Superior Court before him, delaying affairs, and all to the end that he might pocket a small amount of commission.

Judgment confirmed.

Bourgeois & Co., for plaintiffs.

Sicotte & Co., for petitioner.

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MACKAY, DUNKIN, RAINVILLE, JJ.

ALCOCK v. HOWIE.

[From C. C. Iberville.

Sui upon Ontario Judgment where service was personal.

MACKAY, J. The action was brought on a judgment in Ontario. Plea, that the judgment is a nullity; because the defendant never was summoned in Ontario. But what of that, seeing C. S. L. C. cap. 90, sec. 2? The defendant was personally served in his domicile, and ought to have contested as he pleased in Ontario. The judgment dismissing the action ought to be reversed. As to place of contract, or place at which debt was contracted, there is not certainty; the exemplification does not state places as well as it might have done. But under sec. 2, ch. 90, C. S. L. C., the defendant ought to have pleaded preliminarily, or as he pleased, in Ontario.

Judgment reversed.

J. J. McLaren for plaintiff.

Chartrand & Paradis and *Lacoste & Co.* for defendant.

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No's.—In *Baylis v. City of Montreal* (ante p. 62), the grounds assigned in the judgment for the dismissal of the action are as follows:—
"Considering that to recover the money he seeks by his declaration, plaintiff had burden to prove that it never was due by him, and to do this had to prove that the roll called 'a pretended assessment roll, distributing, &c.,' was irregular, illegal, or null and void; that the

plaintiff's declaration, though so charging nullity of the roll referred to, does not go into any particulars, or specification of how, or why, the roll is irregular, illegal, or null and void; that in the absence of the roll it cannot be determined what illegalities, irregularities or nullities affect it, and that plaintiff had burden to prove them, as so much condition precedent to getting a judgment against defendants in an action like the present one *en répétition de l'indu*; that plaintiff has not made such proofs, and therefore *non constat* that the money claimed by him is legally due to him, or that there was not cause lawful for the payment by plaintiff to defendants, doth dismiss the plaintiff's action."

CURRENT EVENTS

CANADA.

SPEECH FROM THE THRONE.—On Friday, Feb. 8, the Fifth Session of the Third Parliament of the Dominion of Canada was opened by Lord Dufferin, with the following Speech from the Throne:—

Honorable Gentlemen of the Senate,

Gentlemen of the House of Commons:

In again summoning you for the despatch of business, I am glad to be able to say that nothing beyond the ordinary business of the country requires your attendance.

It afforded me great pleasure to have had an opportunity before my departure from Canada of visiting the Province of Manitoba and a portion of the outside Territories, which visit I accomplished during last Autumn. I have now had the advantage of visiting every Province in the Dominion during the term of my government in Canada.

I am happy to be able to say that the arbitration on the Fishery claims, under the terms of the Washington Treaty, has been concluded. An award has been made by the Commission of \$5,500,000 as compensation to Canada and Newfoundland for the use of their fisheries during the term of the present treaty. This amount is much less than that claimed by my Government, but having assented to the creation of the tribunal for the determination of their value, we are bound loyally to assent to the decision given.

The exhibition of Canadian manufactures and products at Sydney, New South Wales, was successfully carried out. I trust that the result will be the opening up of a new market for Canadian goods even in so remote a region as the Australasian colonies, shipments of Canadian productions having already been made. The expenditure will slightly exceed the estimate, but I doubt not the cost to Canada will be amply repaid by the extension of her trade.

Preparations have been uninterruptedly carried on, during the last six months, for securing an ample but select exhibition of Canada's products and manufactures at the great exhibition to be held at Paris during the current year. A further estimate will be required to meet the expenditure. His Royal Highness the Prince of Wales, as chairman of the British Commissioners, has assigned a most prominent place to Canada in one of the main Towers, where a Canadian Trophy is now being erected.

A very disastrous fire occurred in June last in the city of St. John, which caused the destruction of a large portion of the city, including all the public buildings owned by the Dominion Government. My Government deemed it necessary to contribute \$20,000 to assist in relieving the immediate wants of the people who were rendered destitute by so appalling a calamity. I also sanctioned the appropriation of some public money, with which to commence the erection of new buildings for the public business, which acts you will be asked to confirm in the usual way.

During last summer my Commissioners made another Treaty with the Blackfeet, Blood and Piegan Indians, by which the Indian title is extinguished over a territory of 51,000 square miles west of Treaty No. 4, and south of Treaty No. 6. The Treaty has been made on terms nearly the same as those under Treaty No. 6, though somewhat less onerous. The entire territory west of Lake Superior to the Rocky Mountains, and from the boundary nearly to the 55th degree of North latitude, embracing about 450,000 square miles, has now been acquired by peaceful negotiation with the native tribes, who place implicit faith in the honour and justice of the British Crown.

Early in the past summer a large body of Indians, under Sitting Bull, from the United States, crossed into British territory, to escape

from the United States troops, and have since remained on the Canadian side.

The United States Government made a friendly but unsuccessful attempt to induce these Indians to return to their reservations. It is to be hoped that such arrangements may yet be made as may lead to their permanent and peaceful settlement, and thus relieve Canada of a source of uneasiness and a heavy expenditure.

The surveys of the Pacific Railway have been pressed to completion during the past season. A complete instrumental survey of the route, by the valleys of the North Thompson and Lower Fraser Rivers, has been made with a view to ascertain definitely, whether that route presents more favourable features than the routes already surveyed to Dean Inlet and Bute Inlet, respectively. It is believed that the additional information now obtained will enable my Government to determine which route is the most advantageous from Tête Jaune Cache to the sea. Full information will be laid before you at an early day, of the season's work in this and other directions.

I am happy to be able to congratulate you on the abundant harvest reaped in all quarters of the Dominion; and I rejoice that under this and other influences there has been some improvement in the Revenue returns, thus indicating, I trust, that the commercial depression that has so long afflicted Canada, in common with other countries, is passing away.

My attention has been called to some imperfections in the existing system of auditing the Public Accounts, and a measure providing for their more thorough and effective supervision will be submitted for your consideration.

The prospect of obtaining, at an early day, greater facilities for reaching the North Western Territories and the Province of Manitoba, is sure to attract a larger number of settlers every year, and, as much of the prosperity of the Dominion depends on the rapid settlement of the fertile lands in those Territories, it is desirable and necessary to facilitate such settlement as much as possible. In order to effect this, measures will be submitted for your consideration concerning the registration of titles, the enactment of a Homestead Law, and the promotion of Railway enterprise in districts not touched by the Canada Pacific Railway.

Your attention will be called to a measure for better securing the independence of Parliament.

Experience has shown that certain changes may advantageously be made in the departmental arrangements existing at present. A bill will be submitted to you for accomplishing this purpose without increasing the expenditure, or the number of Departments.

It is very desirable that there should be uniform legislation in all the provinces respecting the traffic in spirituous liquors. Hitherto that trade has been regulated by Provincial laws, or laws existing before the Confederation of the Provinces, although there has been lately a conflict of authority as to the jurisdiction of the local authorities. A bill making the necessary provision will be submitted for your consideration.

Various measures found necessary for the amendment of existing laws will also be submitted for your approval.

Gentlemen of the House of Commons:

The Estimates for the ensuing year will be laid before you at an early day. They have been prepared with an anxious desire to provide for all the branches of the public service and the execution of pressing public works within the limits of the expected revenue, without increasing the burden of taxation.

I have directed that the Public Accounts of the past financial year shall be laid before you.

ENGLAND.

THE NEW MASTER OF TRINITY.—The *London Law Journal* speaks in warm terms of the election of Sir Henry Maine to the office of Master of Trinity Hall, Cambridge. It says: "In the present day, the career in the world of great mathematicians and classical scholars does not, as a rule, correspond with the expectations formed in the Senate House or the Sheldonian Theatre. The 'Honour men' do not shine as brightly as they ought to do in the real battle of life. But Sir Henry Maine affords a remarkable instance of persistent success. As an under graduate he won the Craven Scholarship, and he graduated as Senior Classic and Chancellor's Medallist. He was Regius Professor of Law at Cambridge for some years, and after that he was Reader in Jurisprudence and Civil Law at the Middle Temple; while he

won acquaintance with the practical part of a lawyer's learning as an equity draughtsman and conveyancer, and even as a revising barrister. For seven years he served on the Council of the Governor-General of India, and for seven years he has sat on the council board at the India Office. He has also held the appointment of Corpus Professor of Jurisprudence at Oxford, with a fellowship at Corpus College. His works on 'Ancient Law' and 'Village Communities' are perhaps the most notable, and certainly the most readable of modern law books. The degree of Doctor of Laws, and the dignity of a Knight Commander of the Order of the Star of India, are rightly borne by this distinguished man. Trinity Hall has for many years maintained its reputation as the cradle of lawyers, and under Sir Henry Maine it ought to flourish with renewed vigour. His appointment reflects the highest credit on the Fellows of the College, and we doubt not that results will justify their selection."

REMINISCENCES OF THE ENGLISH BAR.

The memoirs and letters of the late Senator Sumner, which have recently been published, contain an unexpected fund of information concerning many distinguished members of the bench and bar whom the deceased statesman had the fortune to meet during his visit to England in early life. We avail ourselves of the following notice from the *Albany Law Journal* :—

The affection and favor which young Sumner met from the English bar and bench were quite remarkable. Judges made him sit at their side on the bench,—a distinction which he was loth to accept, deeming that 'the Queen's counsel row is surely enough.' He usually sat in the Common Pleas with Talfourd and Wilde, or in the Queen's Bench with Pollock and the Attorney-General. He writes: 'I will not quit the Bench and Bar without speaking of the superior cordiality, friendliness and good manners that prevail with them in England as compared with ours. They seem indeed a band of brothers. They are enabled to meet each other on a footing of familiarity, because all are gentlemen. This division of labor sets apart a select number, who have the recommendations, generally, of fortune or family, and invariably of education, and who confine themselves to

the duties of a barrister. In social intercourse the judges always address each other by their surnames, without any prefix; and they address the barristers in the same way; and the barristers address each other in this style. Thus, the young men just commencing their circuits addressed Taunton, the old Reporter, who was on his seventy-fifth circuit, simply as Taunton. I believe I have already written you that I was received as a brother, and was treated with the same familiarity as the other barristers.'

Of Talfourd, the author of "Ion," we get some interesting views. We see him stopping at the Garrick Club (of which Sumner was made an honorary member), to get his 'negus' on his way to Westminster Hall in the morning, and his midnight potation with a grilled bone and Welsh rare-bit, on returning from Parliament. Sumner calls him a 'night bird.' Of a dinner at Sir William Follett's he writes: 'Talfourd outdid himself; indeed, I have never seen him in such force. He and Pollock discussed the comparative merits of Demosthenes and Cicero; and Talfourd, with the earnestness which belongs to him, repeated one of Cicero's glorious perorations. Pollock gave a long extract from Homer; and the author of 'Ion,' with the frenzy of a poet, rolled out a whole strophe of one of the Greek dramatists.' When Sumner spoke to Talfourd of Mr. Montague as a person whom he liked, Talfourd replied: 'He is a humbug; he drinks no wine.' Whereupon the correct young Charles remarks, 'Commend me to such humbugs!' As an advocate, Sumner says of him, 'He is a good declaimer, with a good deal of rhetoric and feeling. I cannot disguise that I have been disappointed in him.'

Pollock 'is deemed a great failure' in the House of Commons, although he was leader of the Northern Circuit. 'He has a smooth, solemn voice,' but 'is dull, heavy, and they say often obtuse at the bar.' At dinner on one occasion Sumner sat between Follett and Pollock. 'To the first I talked about law, and his cases; to the latter about Horace, and Juvenal, and Persius, and the beauty of the English language.' Sumner gives us no account of Pollock's personal appearance, but the author of 'The Bar' has a few lines on it:

"Pale Pollock, who consumes the 'midnight oil,'
And plies his task with unremitting toil,
Till, as the life-drops from his cheeks retreat,
He looks as though he had forgot—to eat."

Follett, Sumner says, is 'a consummate lawyer,' 'the best of all,' 'a delightful man, simple, amiable, and unaffected as a child.' 'He has extended the hand of friendship to me in a most generous way. His reputation in the profession is truly colossal, second only to that of Lord Mansfield; in his manners he is simple and amiable as a child; he is truly lovable.' Brougham said in 1838 there were no good speakers at the bar except Follett and Pemberton. Talfourd's first acquaintance with Follett was when the latter was a student, or just after his call to the bar, in getting him released from arrest early one morning for scaling the walls of the Temple. Follett's perception of legal principles and reasoning was intuitive, apparently almost without effort. 'With all the praise accorded to him from judges, lawyers, and even from Sir Peter Lawrie (ex-mayor), who thought him the greatest lawyer he ever knew, it does not seem to be thought that he has remarkable general talents or learning. They say he has 'a genius for the law;' but Hayward, of the *Law Magazine*, says he is 'a kind of law-mill; put in a brief, and there comes out an argument, without any particular exertion, study, or previous attainment. I have heard him several times. He is uniformly bland, courteous, and conversational in his style; and has never yet produced the impression of power upon me.' Sumner attributes Follett's early success to his amiability. As a speaker he was fluent, clear and distinct, with a beautiful and harmonious voice. His business was immense—£15,000 annually—and many of his briefs he hardly read before rising in court. He was equally successful in the House of Commons, where Sumner often heard him called for. His early death prevented his probable elevation to the Lord Chancellorship.

Of Wilde, afterward Lord Chancellor, Sumner speaks as the most industrious person at the English bar, often working from six o'clock in the morning until two the next morning; a man of great power, but harsh and unamiable, with an immense practice; supreme in the Common Pleas, with a great influence over Chief-Justice Tindal; in person short and stout, with a vulgar face; his voice not agreeable, but his manner singularly energetic and intense; reminding Sumner of Webster; his language having none of the charms of literature, but

correct, expressive, and to the purpose; in manners, to his friends, warm and affable; entertaining very elevated views of professional conduct. He told Sumner that he should not hesitate to cite a case that bore against him, if he thought the court and opposite counsel were not aware of it. Early in his career he had taken advantage of a trust relation and purchased for himself, and in consequence was banished from the circuit table, and after did not mingle with the bar, or if he did, it was with a downcast manner. Sumner predicted that the government, anxious to avail itself of his great talents, might overlook his offense, but that society would not. As to the government, Sumner was right, for Wilde afterward became Solicitor-General, Attorney General, Chief Justice of the Common Pleas, and Lord Chancellor, with the title of Baron Truro.

Charles Austin, the great parliamentary lawyer, Sumner describes as 'one of the cleverest, most enlightened, and agreeable men in London,' and in his judgment the first lawyer in England; a fine scholar, deeply versed in English literature and the British Constitution; a more animated speaker than Follett, perhaps not so smooth and gentle, nor so ready and instinctively sagacious in a law argument, but immeasurably before him in accomplishments and liberality of views; the only jurist in Westminster Hall; in conversation very interesting, full of knowledge, information, literature, and power of argument; in politics a decided but rational liberal; brilliant and clever, all informed, and master of his own profession, take him all in all the greatest honor of the English bar.

Campbell, the Attorney-General, afterward Lord Chancellor, and author of the 'Lives of the Lord Chancellors and Chief Justices,' gets a passing notice. A very powerful lawyer, laborious, plodding, with great natural powers, unadorned by any of the graces, able, dry, and uninteresting. His manner was coarse and harsh, without delicacy or refinement, his accent marked Scotch. Not liked by the bar, all bowed to his powers. As to his politics, the best account is derived from one of Sumner's stories. Lord Plunkett inquired of him the meaning of 'locofoco,' and he defined it 'a very ultra-radical;' whereupon Follett and Pollock both laughed, and cried out to the Attorney-

General, 'Campbell, you are the loco loco!' Sumner tells us that the *p* in Campbell's name was enunciated, and not omitted, as with us.

Of the judges we have some sharp portraiture. Lord Denman he deemed quite an ordinary lawyer, but 'honest as the stars,' and impartial. In person, every inch the judge, 'he sits the admired impersonation of the law,' tall and well-made, with a grave voice and manner; somewhat impatient at times, we infer. 'Bland, noble Denman! On the bench he is the perfect model of a judge,—full of dignity and decision and yet with mildness and suavity which cannot fail to charm. His high personal character and unbending morals have given an elevated tone to the bar, and make one forget the want, perhaps, of thorough learning. In conversation he is plain, unaffected and amiable.' He thought Brougham one of the greatest judges that ever sat on the woolsack. The wig he considered the silliest thing in England. He was trying to carry a bill through the Lords, allowing witnesses to affirm, in case of conscientious scruples, and asked Sumner what the American practice was, but said he could not venture to allude to it, for it would tell against his measure. We have changed all that, and now John Bull adopts our law reforms and eats our beef!

We have a graphic picture of Tindal, Chief Justice of the Common Pleas, the model of a patient man, who sits like Job, while the debate goes on; very quiet, bent over his desk, constantly taking notes; eyes large and rolling, stature rather short; manner singularly bland and gentle, deficient in decision; learning, patience, and fidelity of the highest order; one of the few judges who study their cases out of court; 'one of the kindest men that ever lived.' The author of 'The Bar' also gives us a glimpse of him:

"Tindal, beneath whose sleepy lurking eye
A fertile mind Lavater would decry,
A treasury filled with intellectual store,
From which, the more he takes, it grows the more,
A thing unheard of in historic fame,
Would the King's treasury always did the same!"

Then we have Park, the oldest judge on the bench, fifty-eight years in the profession, petulant, puritanical, a staunch Tory, who believed in wigs and hated Jack Campbell. He attributed Denman's dislike of wigs to his coxcombry, and desire to show off his person, and when a wig was invented to prevent the appearance

of powder, without its dirt, he resisted its introduction as an innovation on the Constitution, and refused to recognize his own son when he appeared in one. And then comes Vaughan, who was made a judge, it was said, by George IV., at the instigation of his favorite physician, Sir Henry Hallford, and hence was called a judge by prescription. With the smallest possible allowance of law for a judge, he abounded in native strength, sagacity, and freedom of language. He troubled himself very little out of court with his cases. Fond of sports, he showed Sumner four guns, and told him with great glee, how he persuaded Wilde not to make any motions on a certain day, got court adjourned at noon, went fifteen miles into the country, and before four o'clock shot four brace of pheasants, sitting on horseback, as from lameness he was unable to walk to any great extent. A great lover of Shakespeare, he would often interchange notes with Sumner about the great poet's works, while Follett or Wilde was making a long argument, the spectators of course supposing that it was all about the case under discussion. Seventy years of age, rheumatic and gouty, beside being lame; tall and stout; plain, hearty and cordial in his manners; on the bench, bland, dignified, yet familiar, exchanging a joke or pleasantry with the bar on all proper occasions; less eminent for book learning than for strong sense, knowledge of practice and of human nature. The author of "The Bar" thus depicts Vaughan at the bar:

"Grisly and gruff, and coarse as Cambridge brawn,
With lungs stentorian bawls gigantic Vaughan;
In aspect fearless, and in language bold,
'Awed by no shame—by no respect controlled,'
Straight forward to the fact his efforts tend,
Spurning all decent bounds to gain his end.
No surgeon he, with either power or will,
To show the world his anatomic skill,
Or subtle nice experiments to try—
He views his subject with a butcher's eye,
Nor waits its limbs and carcase to dissect,
But tears the heart and entrails out direct."

In the Exchequer, we have Abinger, Parke, and Alderson described. The first was Scarlett, the greatest advocate of his time, yet never eloquent. Sumner calls him 'the great failure of Westminster Hall.' Too old to assume new habits when he reached the bench, he lacked the judicial capacity and was jealous of his associates. 'Brougham says that Scarlett was once speaking of Laplace's 'Mécanique Céleste' at Holland House as a very easy matter; Brougham told him he could not read it, and

doubted if he could do a sum in algebraical addition. One was put, and the future Lord Abinger failed; and as Lord B. said, he did not know so much about it as a 'pot-house boy.' In politics a thorough Tory; in society cold and reserved; in person the largest judge on the bench. Sumner writes of Abinger: 'I was not particularly pleased with him: he was cold and diffident, and did not take to me, evidently; and so I did not take to him. Neither did I hear him, through a long evening, say anything that was particularly remarkable; but all the bar bear testimony to his transcendency as an advocate.'

To Parke, afterward Lord Wensleydale Sumner says the palm for talent, attainments and judicial penetration is conceded by the profession, who regard him as *facile princeps*. About fifty-six years old, above the common size, erect, 'with the brightest eyes I ever saw,' dressed with great care, and in the evening wearing a blue coat and bright buttons; a man of society, 'not a little concealed and vain.' Not fluent, but with no particular want of words; a well-read lawyer, yet not a jurist. Alderson comes next. He was an excellent scholar, carrying off the highest mathematical and classical honors at Cambridge. In person awkward, in voice abrupt and uneven, with light hair, and a high forehead. Hasty and crotchety, he was thought an unsafe judge. He had more enemies than any other judge in the Hall. Sumner says he heard from him a higher display of judicial talent than from any other judge in England. Elsewhere he says, in a letter to Story: 'Baron Alderson is the first equity judge in the Court of Exchequer, and unquestionably a very great judge. I have sat by his side for three days on the bench, and have constantly admired the clearness, decision, and learning which he displayed. In one case of murder, where all the evidence was circumstantial, I sat with him from nine o'clock in the morning till six at night. His charge to the jury was a luxury. I wish you could have heard it. It was delightful to hear an important case, so ably mastered by one who understood his duty and the law, and did not shrink from laying before the jury his opinions. Alderson's voice and manner remind me of Webster more than those of anybody I have seen here; his features are large, but his hair, eyes, and complexion are light.' The author of

'The Bar' has a drive at Alderson, when young, pointed at his triumphs as senior wrangler at Cambridge:

"Aspiring Alderson—a sessions' star,
Already 'outs a figure' at the Bar,
Maintains his academic honors past,
And every subject wrangles to the last."

Baron Maule was 'a very peculiar person.' Distinguished at Cambridge both in classics and mathematics, he kept up his acquaintance with those studies. He was confessed on all hands to be the first commercial lawyer in England, but his moral character rendered him in some respects a strange person for a judge. He always took porter before an argument, he said, 'to bring his understanding down to a level with the judges.'

Patteson, 'the ablest lawyer in the Queen's Bench—some say the first in all the courts,' was short and stout, his face heavy and gross, and was very deaf. 'Little Johnny' Williams, an excellent classical scholar, had little legal talent, and was principally noted for early rising and for falling asleep in company.

It is curious to note how many of the legal celebrities described by Sumner were concerned in the trial of Queen Caroline—Brougham, Lushington, Wilde, Denman, Tindal.

Comparing the English with the American lawyers, Sumner says: 'The English are better artists than we are, and understand their machinery better; of course, they dispatch business quicker. There is often a style of argument before our Supreme Court at Washington which is superior to anything I have heard here.' In regard to the character of the bar and their relations to the bench in England he says: 'I know nothing that has given me greater pleasure than the elevated character of the profession as I find it, and the relation of comity and brotherhood between the bench and bar. The latter are really the friends and helpers of the judges. Good will, graciousness and good manners prevail constantly. And then the duties of the bar are of the most elevated character. I do not regret that my lines have been cast in the places where they are; but I cannot disguise the feeling akin to envy with which I regard the position of the English barrister, with the intervention of the attorney to protect him from the feelings and prejudices of his client, and with a code of professional morals which makes his daily duties a career of the most honorable employment.'

The Legal News.

VOL. I. FEBRUARY 23, 1878. No. 8.

DISSENTIENT OPINIONS.

Last week, referring to the suggestion of a contemporary, that dissentient opinions in the Supreme Court should be suppressed, we remarked that such a course seemed to us objectionable as being deceptive in itself, as unfair to dissentient Judges, and calculated to retard the progress of the science of jurisprudence. That it would be a deception admits, we think, of no doubt. What would be the object of suppressing the dissent if not to present the appearance of unanimity? And if the Court be made to appear unanimous when it is not so, somebody must be deceived or misled by the artifice. Now, however good the end in view, we cannot think it should be attained by misrepresentation. The day for such pious frauds is past. But it may be said, there is no deception because the judgment is not represented to be more than the judgment of a majority. If so, that numerous class of judgments in which the Court is actually unanimous loses in force just as much as the non-unanimous judgments gain through the failure to state exactly how the Court stands. The force of important enunciations of principle may be weakened by the whisper or the surmise that the principles laid down by the Court are the views of a bare majority. The Court will often be supposed to be at variance when it is perfectly agreed, and Judges who fail to state their opinions from the bench at the time the judgments are delivered may improperly be counted as dissentients.

This leads us to the second ground of objection above stated—that the suppression of dissent is unfair to the Judges themselves. The minority may be condemned by such a rule to remain silent while a doctrine of which they are convinced that time will demonstrate the unsoundness, is proclaimed from the bench by their colleagues, and no disclaimer will be possible. How often in the past has an erroneous principle obtained judicial sanction for a time until the strong light of criticism and debate has exhibited its weakness and led to its rejection?

Surely the minority in such a case would be justified in taking some means to let the world know that they are not to be held responsible for the error. Number does not always constitute strength, and the minority may be men of extraordinary powers, while the majority are quite the reverse. Even where the decision turns on a question of evidence, an injustice may result from the suppression of dissent. For example, the decision of the majority may attach a serious imputation of fraud to an individual. Is not the latter entitled to the benefit of the statement that certain members of the Court did not share in a view which dishonors him? In an election case, the judgment of the majority may disqualify a member of Parliament. Are the minority to refrain from expressing their disbelief of the evidence on which the majority have based so serious a condemnation?

The third ground of objection, that the suppression of dissent would retard the progress of the science of jurisprudence, appears to us to be equally clear. If the dissentient opinions are unsound, it is better, nevertheless, to put them on record. Their unsoundness will become more and more apparent, the longer they are scrutinized and canvassed. On the other hand, if the dissentient opinions are the sounder of the two, their suppression can only have the effect of giving to error the mantle of increased authority. It will be more difficult to correct the error; but *magna est veritas*—in the end the truth will get the upper hand, however obstinately the vicious precedent may fight for existence and respect. We cannot find any words in which to describe this disintegrating process so apt as those employed by a Westminster Reviewer some years ago, in referring to the obstruction to justice caused by a bad decision. "Judges," says this writer, "are not infallible, and though actuated by the purest intentions, they sometimes decide wrongly. Such decisions are, nevertheless, available for citation, like all other precedents. Now, when an erroneous decision in the past comes to be pressed upon a Judge in the present, one of two things must happen—either precedent must be followed, or it must be disregarded. The traditions of the profession point in one direction, while the instinct of justice exercises its influence in the opposite. The result is oftentimes a com-

promise. The decision is in effect disregarded, but its authority is saved by recourse being had to some shadowy and fictitious distinction. This practice was recently satirized by a living Judge, who, on a case which we will call "Brown v. Robinson being cited in argument, informed the bar that he should not feel himself bound by that case unless a suit were before him in which the facts were precisely similar; 'indeed,' added his lordship, 'unless the plaintiff's name were Brown, and the defendant's Robinson!'

The suppression of dissentient opinions would greatly aggravate the mischievous consequences of an erroneous precedent. However unsound a decision might be shown to be, it would be hard to get over it unless legislative action was invoked; and the growth of the science of jurisprudence would be stunted correspondingly.

If Judges are to be present at the rendering of the judgment, and to refrain from indicating their dissent from the views which may be expressed, the decisions of the highest tribunal will tend to resolve themselves into a mere vote of yea or nay upon the judgments submitted to them. As soon as the fact has become known during the deliberation that a majority of the Court are inclined one way or the other in any particular case, the other members of the Court will have small encouragement to undertake an arduous examination of the questions involved, knowing, as they do, that it is labor in vain, as they will be debarred from stating the conclusions at which they may arrive.

To conclude: instead of adopting a cast-iron rule, is it not preferable to leave it to the discretion and wisdom of the Judges themselves to decide when they shall yield their individual opinion and refrain from entering a dissent? Who so well qualified as they to appreciate the importance of certainty in the law, and the advantage, where it can be done without the sacrifice of strong convictions, of presenting a harmonious judgment? For our part, with a vivid realization of the mischief caused by crude or hasty dissents, we are still disposed to favor a straightforward policy, be the consequences what they may.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Quebec, December 7, 1877.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

SHORTIS et al., Appellants, and NORMAND, Respondent.

Collocation—Preference—Appeal.

On the 28th of August, 1875, the Sheriff of Three Rivers returned before the Court the monies he had levied by the sale of real estate belonging to one Coté, an insolvent. The respondent, who was assignee to the estate of Coté, filed a claim on the 20th of January, 1876, for \$171.57, due Claire, who had been interim assignee, and \$211.35 due to himself for fees, commission and disbursements in relation to the estate. On this claim the respondent was collocated for \$308.80 by report of 23rd of February, 1876. The appellants, who are hypothecary creditors, appealed from the judgment homologating the report of collocation which they had not contested in the Court below.

Held, 1. As in *Eastern Townships Bank v. Pacaud*, that appellants, whose mortgages were mentioned in the Registrar's certificate, were entitled to appeal from the judgment homologating the report of collocation, although they had not contested the report in the Court below.—(Art. 761 and 1118 C. C. P.)

2. That respondent's claim, having been filed after the expiration of the delay for filing opposition without leave of the Court, was improperly filed, and the respondent should not have been collocated.

3. That as no vouchers were produced by the respondent to show that he was the assignee to the estate of Coté, or that Claire had acted as interim assignee and transferred his claim to the respondent, or been paid by him, there was no *prima facie* case made out to entitle the respondent to be collocated.

4. That the motion to reject the appeal on the ground of acquiescence, was not supported by the affidavits; and the motion to reject part of the factum and exhibits filed being unnecessary, both motions were rejected without costs.

SUPERIOR COURT IN REVIEW.

Montreal, Jan. 31, 1878.

JOHNSON, DUNKIN, RAINVILLE, JJ.

SOULIÈRE v. HÉRON.

[From S. C., Montreal.

Retrait—Costs.

JOHNSON, J. This case ought never to have been brought before this Court. The main issue was as to the right of the landlord to take a *saïs conservatoire* for rent, and the judgment maintaining the seizure is right. The amount actually due at the time the seizure was taken was very small, and judgment was rendered for \$20 too much, for which a *retrait* has since been filed; and we think this discontinuance ought to be allowed. The judgment is therefore modified to that extent; but it is evident that that was not in contestation by the parties, and was not the reason for this inscription, so that the defendant will pay the costs here. The Court of Review will not give costs to parties coming here to rectify a trifling error which had already been rectified by *retrait*.

Judgment modified, without costs.

L. N. Demers for plaintiff.

Cruckshank for defendant.

JOHNSON, DUNKIN, RAINVILLE, JJ.

WHITE et al. v. WELLS.

[From S. C., Montreal.

Partnership—Dissolution.

JOHNSON, J. The judgment in this case held the defendant liable as one of the firm of Foster, Wells & Shackell. The note represented a liability of the firm, and Foster, who signed it, had authority to do so. The dissolution of the firm did not bind the plaintiffs. The plea of the defendant, which was that the note was given without his knowledge, in the name of a terminated copartnership, after the registration of its dissolution, is not proved according to the requirements of law, under Articles 1834 and 1900 C.C. The dissolution itself conveyed to Foster the power to sign, and those who conveyed it, being members of the firm, must be held to have knowledge of its business.

It was contended that a note of the defendant's firm had not been credited, but that is not in the issue of record.

Judgment confirmed.

Lunn & Davidson for plaintiffs.

Macmaster & Co. for defendants.

SUPERIOR COURT.

Montreal, Jan. 31, 1878.

JOHNSON, J.

OWENS et al. v. UNION BANK.

Maritime Lien—Outfitter—Furnishing the Ship on her Last Voyage.

Held, that the privilege under C.C. Art. 2383 upon vessels for furnishing the ship "on her last voyage," does not apply to supplies furnished during the whole season of navigation, though the vessel be one making short trips on inland waters.

JOHNSON, J. The plaintiffs furnished to the Ottawa & Rideau Forwarding Company, in the season of 1876, a quantity of cordwood, which was used that year on two of the Company's steamers plying between Ottawa and Grenville, and was delivered to them at Cameron's wharf, in the county of Prescott, in Ontario. The Company became insolvent in August, 1876, and the defendants, as registered mortgagees, took possession of the vessels under the powers conferred by the mortgages. The vessels were registered: one at the port of Ottawa and the other at the port of Morrisburg, both in the Province of Ontario. The plaintiffs assert a privilege on the two steamers for the payment of the price of the wood. There were several points raised at the argument; but I shall not now discuss any of them. I do not even discuss the question of privilege with reference to the reasonableness of applying it under any circumstances to vessels making short trips on inland waters. Much might be said, no doubt, as to the privileges of an outfitter for the last voyage—for instance, of the ferry-boat from the Market wharf to St. Lambert; but however that may be, it appears to me improper to extend the privilege to repairs or supplies of ships on their last voyage to a whole season of navigation. I therefore take the case simply on the point of a series of trips during the whole summer season, not constituting a last voyage of a ship in the sense of the law; and I do this on the positive authority of decided cases.—See Parsons on Shipping, vol. 2, p. 143, and the cases there cited. On this ground, the plaintiffs' action is dismissed with costs.

Doutre & Co. for plaintiff.

Cramp for defendant.

COMMUNICATIONS.

QUEBEC JURISPRUDENCE.

To the Editor of THE LEGAL NEWS :

SIR—In your article on "Dissentient Opinions," in the last number of the *LEGAL NEWS*, you quote from an Ontario publication an article in which it speaks in rather unflattering terms of the decisions of the Courts of this Province. I do not intend any reply to this article in the sense of defending the decisions of our Courts. You yourself have sufficiently done so already, and I think with you, that the profession in Ontario is not in a position to throw stones or other missiles about. If the decisions of the Quebec Courts are little quoted in Ontario, the decisions of the Ontario Courts are as little quoted here. Of the Ontario digest, which has been for some time past in course of publication, there are, as far as I can discover, but one or two copies in the city, while but very few of the fraternity here are apparently aware of its existence. So much for Ontario decisions.

But while I conceive the Ontario people are not in a position to cast aspersions themselves, is there no truth in what they say, or if there is, should we be too proud to confess it?

You point to Sir James Stuart and others as samples of our judiciary, but is it not a little like pointing to Washington as a sample of American statesmen?

Let us profit by the ungracious remark of our Toronto friend and look for a moment on this side of the curtain also.

It is granted that the decisions of our Courts are not infallible. The decisions of no Courts are. It is granted that our jurisprudence is not perfect. None is. Is it then as near perfect as we can make it, or is it possible to advance it a step further towards that star-like goal, perfection? If I venture to say we can, I think that must be granted also.

We have a Code of Civil Law of which we are justly proud. It is all the Code Napoléon is, by which the people of France have been governed for the last half century, and perhaps a little more.

And, notwithstanding this, I have very little hesitation in saying that the decisions of our Courts have a larger degree of uncertainty about them than those of the Courts of any

country with which we are at all familiar. And why? Because the judges in our Courts have not sufficient unanimity—or unity, perhaps, would express it better—in their bearing towards the jurisprudence of the Province as a whole; but treat each case separately and individually, and sometimes with very little regard for the opinions of each other. Each judge thinks his own opinion quite as good as that of any other judge, or bench of judges, or number of judges expressed at different times, and "rather better." To illustrate, if I am not misinformed, a well known judge of the Superior Court here, has more than once, when authorities and precedents have been quoted to him, declared that he cared nothing about them; that he considered his own opinion quite as good as that of the authority quoted to him. And so indeed it may be; but if every judge acts entirely upon his own opinion, sometimes very hastily formed, and attaches no weight to the opinions of others, who have been called upon to decide the same points in previous cases, what must be the result? Just what we see it in our courts every day. Unless the law is expressed in black and white in the Code, a lawsuit is the merest game of chance. You might as well—and, indeed, for the client very much better—flip up a shilling and abide by the result, as appeal to the courts. And even when the law is expressed in black and white, it is by no means uncommon to see a judge exhausting his ingenuity to evade the plain meaning of it, in an endeavor to make it square with some preconceived opinion, or, worse still, some hidden motive or feeling existing in his breast in regard to the matter in hand. I might, and so might any practitioner in the Province for the matter of that, cite scores of points of law and practice—points which are, in some instances at least, recurring every day—which have been tossing about for years past, like chips upon a wave, blown hither and thither by the breath of every succeeding decision, and finding no rest, to the disgust of clients and the no small anxiety of attorneys.

The direct cause of this I have shown, but there are remoter causes behind, which I may endeavor at least to conjecture at in a future communication, if you can find room for this.

Yours, S.

CURRENT EVENTS.

ENGLAND.

THE UNITED STATES AS A PLAINTIFF IN ENGLISH COURTS.—The *Solicitors' Journal* says that some curious reasons seem to have been given for rejecting the proposal, which has been recently revived at Washington, that measures should be taken for the recovery by the United States from the Bank of England of balances remaining to the credit of the Southern Confederacy at the time of its collapse. The grounds of objection are stated to be, first, that the United States Minister is not willing to ask any favor of the British Government, such as the right to sue in the English courts, and next, that when inquiries were made into the matter during the administration of General Grant the "representatives of the British Government" expressed themselves as perfectly willing to recognize the United States as the successor of the defunct Confederacy, and to turn over to it all balances formerly belonging to the Confederacy held in Great Britain, provided the United States would assume its liabilities to British subjects. The first objection seems absurd. No "favour" of the British Government is needed to enable the United States to sue in our courts. As a matter of fact, the United States itself has been more than once admitted to sue as a matter of right; and in numerous cases, such as *The King of the Two Sicilies v. Wilcox*, 1 Sim. (N.S.) 301, where the plaintiff recovered ships bought by a revolutionary government out of his own despoiled treasury; and *Emperor of Austria v. Day*, 9 W.R. 712, where the plaintiff prevented the issue of bank notes by M. Kossuth, foreign states have had justice done them in our courts without fear or favor. As to the second objection we do not see what our Government has to do in the matter; and we imagine the reference intended must be not to any declaration of the "representatives of the British Government," but to the doctrine laid down in the case of *United States of America v. McRae*, 17 W. R. 764, L. R., 8 Eq. 69, in which Lord Justice James, then Vice-Chancellor, expressly distinguished between property coming to the restored Government of the United States as successor of the confederacy, and property coming to it by virtue of its right as a restored government. It was

there held, dismissing a bill for an account against an agent for the Confederate Government, that money voluntarily contributed to the Confederate Government could only be recovered from an agent of that Government to the same extent, and subject to the same rights and obligations, as if the Confederate Government had not been displaced, and was itself proceeding against the agent.

LENGTH OF TRIALS.—A solicitor, says the *Solicitors' Journal*, moved by the recollection of the Tichborne trial, and the seven days' trial of the Penge case, has been at the pains to give, in a letter to a daily journal, an interesting analysis of the principal criminal trials which have taken place during the last fifty years, with a view to ascertain how far they differ, in intricacy, and in the number of witnesses examined, from the trials of the present day. The result of his investigation, as to the earlier trials, says the *Journal*, may be summed up as follows:—

"At Patch's trial, in 1806, for the murder of his partner,—a very intricate case,—there were thirty-three witnesses, and the trial lasted one day. Bellingham's trial, for the murder of Spencer Perceval, in which there were sixteen witnesses and long defence, lasted only one day. Thistlewood's trial, for the Cato-street conspiracy, with forty witnesses, lasted two days. In 1824 occurred Thurtell's trial, at which there were forty-six witnesses—including one who was an accomplice, and who was examined at considerable length, and another who was called in the course of the summing up. The trial lasted two days. In 1828, Corder was tried, a long indictment read, twenty-six witnesses; and the trial lasted one day and half. In 1828, Burke's trial took place; a long argument as to the indictment, sixteen witnesses (one of them being an accomplice), and the trial lasted one day. In 1831, Bishop, Williams, and May were tried for the murder of the Italian boy; there were forty-one witnesses, and the trial lasted one day. In 1837, Greenacre's case; thirty-five witnesses, two days. In 1839, Frost, for high treason; there were sixty-nine witnesses, one whole day taken up with legal arguments, and the trial lasted seven days. In 1840, Courvoisier: forty-four witnesses, three days; and, in the same year, Gould's case: forty witnesses, one day.

In 1843, McNaghten's case : several scientific witnesses, forty-seven witnesses in all; two days. In 1845, Tawell : twenty-one witnesses, exclusive of those called to character, two days.

"Comparing these trials with our modern 'great cases,' Mr. Woodall asks why the Wainwright case, with sixty-nine witnesses, should last nine days, whilst Greenacre's, with thirty-five witnesses, lasted only two days; and Bishop, Williams, and May, with thirty-seven witnesses, lasted only one day? Or, why should the Penge case, with its thirty-eight witnesses, or thereabouts, require seven days, when Thurtell's, with forty-six witnesses, or Manning's, with forty-seven, only required two? He observes, that the mere circumstances that the court formerly sat earlier in the day, and that counsel for the prisoners were not formerly allowed to address the jury for their clients, go but a little way in accounting for the difference; for, in many of the earlier trials, speeches of considerable length were read, either by the prisoner, or by an officer of the court. And, we may add, the fact, on which he is disposed to lay considerable stress, that the judge has now, as he had previously, to take full notes of the evidence, will not explain the enormous increase in the length of the trials. Of course, the more evidence there is, the more will the slowness of the judge in taking it down lengthen the trial; but the question is, Why is there now-a-days so much more evidence for the judge to take down? And this Mr. Woodall does not attempt to explain. Without pretending to furnish an answer to the question, which would involve the consideration of a large variety of reasons, we may refer to one, which appears to be very much overlooked; viz., the decline of what we may term self-reliant discrimination on the part of the persons whose duty it is to get up and deal with the evidence for the prosecution or defence. The preliminary inquiry before the magistrates is lengthened, from anxiety that nothing which may turn out to be of any importance shall be omitted; the depositions are swollen to an enormous bulk, and the result is that opportunities for the practice of cross-examination (generally discouraged, it is true, by the judge), as to variance between the evidence of the witness on the depositions and in court, are greatly increased. Cross-examination at the trial is

extended because counsel does not like, on his own responsibility, to omit a question which may possibly benefit his client. Re-examination is extended because the cross-examination may possibly have damaged the effect of the evidence. And it can hardly be denied that the professional opinion which in former days would have curbed these excesses is diminishing in influence. There is less opportunity for association between members of the bar than formerly; and, as a consequence, counsel, in conducting a case, are less controlled by the apprehension of professional criticism. And it may, perhaps, be thought that learned judges, who have just left off sinning in the way of prolixity at the bar, are not very likely to reprove this fault in others."

THE CLEOPATRA OBELISK.—SALVAGE.—It will be remembered that the vessel containing the Cleopatra obelisk had to be abandoned at sea. It was afterwards picked up by the "Fitzmaurice," and is now held to answer a claim for salvage; and the question has arisen how the amount of salvage earned is to be estimated. *The Solicitors' Journal* says:—

"The value of the property saved is but one of the ingredients of salvage service, and it is only as to this ingredient that the case is a peculiar one; but it must be admitted that it is a difficult question to say in what manner the obelisk is to be valued. On the one hand, it would be unfair to value it simply as a block of granite, and, on the other, it seems almost impossible to put a value upon it as a work of art, or upon its historical associations. We are not aware of any reported salvage case in which the property saved has had what might be called a fancy value. There is high authority for saying that the valuation in a policy of insurance on the ship or goods saved is *prima facie* a mode of ascertaining the value for salvage (1 Park on Insurance, 327); but it is understood that, while Mr. Dixon's interest in his contract was insured to some extent, no insurance was effected on the obelisk. As regards the proportion of value awarded by the English Court of Admiralty, there is no fixed rule of amount. In the recent case of "*The Amérique*" (L. R. 6 P. C. 468), the rule of the court was in the judgment stated to be that, though the value of the property saved is to be considered in the estimate of the remuneration,

it must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered; and a judgment of Lord Stowell's was cited, in which he says that, 'in fixing the proportion of the value, the court is in the habit of giving a smaller proportion where the value is large, and a higher proportion where the value is small; and for this obvious reason, that in property of small value a small proportion would not hold out a sufficient consideration, whereas in cases of considerable value a smaller proportion would afford no inadequate compensation.' In the recent case, the derelict vessel and her cargo were together valued at £190,000. Sir R. Phillimore awarded £30,000 salvage, which was on appeal reduced by the Privy Council to £18,000. In the case of "*The Rasche*" (22 W. R. 240, L. R. 4 A. & E. 127), where there were circumstances of great difficulty and gallantry in the salvors, the sum of £3,290 was awarded on a value of £6,294. Generally, one-half the value may be stated as the outside limit awarded."

IRELAND.

JUDICIAL ECCENTRICITY.—Lord Justice Christian maintains his attitude as an "irreconcilable" (*ante*, p. 9). The Council of Law Reporting having asked him to assist the reporting of his judgments by the communication of his notes, or by revising the stenographic report of them, he responds by telling them not to report him at all. The Council are, therefore, left to their own resources.

UNITED STATES.

RAILWAY PASSENGER.—In the case of *Stone v. The Chicago & N. W. R.R. Co.*, the Supreme Court of Iowa has had under consideration the frequently recurring question of the right of passengers, who have purchased tickets for a continuous journey, to stop over at way stations. The decision of the Iowa Court is in the same sense as that of the Quebec tribunal in *Livingstone v. The G.T.R.R. Co.*, reported at p. 13, vol. 19, of the *Lower Canada Jurist*. The action was for damages for the expulsion of the plaintiff from the defendant's cars. The plaintiff bought a ticket from Clinton to Sioux City. Soon after the train started, the conductor gave him a check, which notified him that, if he wished to leave the train before reaching his destination,

he must obtain a special permit. Without doing so, the plaintiff left the train at Marshalltown, an intermediate station; remained twenty-four hours; and resumed his journey the next day, on the train passing through Marshalltown at the same hour, to go to Boone. The conductor refused to permit him to ride on his original ticket, and put him off at the next station—State Centre. The plaintiff then went to the ticket office, and, buying a ticket from State Centre to Boone, again entered the train; but the conductor refused to allow him to ride, unless he also paid the fare from Marshalltown to State Centre; and, the plaintiff declining, he was again expelled from the train. On the question of the second expulsion of the plaintiff, the Court (Seever, J.) said:—

"After the plaintiff had been ejected, he purchased a ticket from State Centre to Boone, and sought to enter the train from which he had been ejected; and was prevented from so doing by the conductor, who had knowledge that such a ticket had been purchased. In *O'Brien v. B. & W. R.R. Co.*, 15 Gray, 20, the train was stopped, and the plaintiff rightfully ejected, and, as the train started again, the plaintiff got on the rear car. The conductor, being so informed, went to such car, and, 'although the plaintiff, before any attempt was made to stop the cars a second time, offered to pay whatever fare the conductor should demand,' it was held that the second expulsion was justifiable. It is said by the court, 'After being rightfully expelled from the train, he could not again enter the same cars, and require the defendant to perform the same contract he had broken.' It is not necessary that we should go so far as was done in the case just quoted; because the plaintiff at no time offered to pay his fare from Marshalltown to State Centre. He had just ridden on that train between those points; and, as we have said, when he entered the cars he was bound to pay his fare to his destination. This he contracted to do; and the defendant contracted to carry him on that train, and none other. This contract was broken by the plaintiff, and he had no right to insist he should go on that train, at least without paying or offering to pay the fare between Marshalltown and State Centre. This ruling by no means excludes him from any other train. Besides this, suppose the plaintiff at State Centre had ten-

dered to the conductor his fare from that point to Boone, could it be claimed this would entitle him to ride on that train to the latter place? We apprehend not. The purchase of a ticket from the ticket agent would give him no greater rights; for under such ticket he would be claiming the same right under the same state of facts he would not be entitled to, had he dealt alone with the conductor. The fact that he made use of another agent of the company other than the conductor cannot enlarge his rights, or change the legal aspect of the case. It must be that the transaction with the agent was a mere continuation of the transaction with the conductor. Both had reference to the right of the plaintiff to ride on that train without the payment of fare from Marshalltown to Boone. The payment of such fare to the agent could not, under the circumstances, give him any more or greater rights than if he had tendered the same amount to the conductor."

RECENT ENGLISH DECISIONS.

Proxy.—Bankruptcy Rules, 1870, provides that the instrument appointing a proxy shall be under the hand of the creditor, and in the form given in the schedule to the rules. That form is as follows: "I appoint C. D., of, &c., my proxy in the above matter." A creditor gave his solicitor a blank proxy duly signed, and the solicitor filled in his own name, and undertook to act under the proxy. *Held*, that the proxy was good.—*Ex parte Lancaster*, 5 Ch. D. 911.

Seaworthiness.—A ship, while lying in the port of S., in a seaworthy condition, was chartered of defendant, by the plaintiff, to proceed to a wharf in said port, take on a cargo of cement, and proceed with it to the port of D. While lying at the wharf she became unseaworthy, though without the knowledge of the defendant, and, while on the voyage, foundered, and the cargo was lost. The jury found the defendant guilty of no negligence. *Held*, that the warranty of seaworthiness attached at the time the ship was loaded and ready to start on the voyage, and was not satisfied by her being seaworthy while lying in port before the cargo was on board.—*Cohn v. Davidson et al.*, 2 Q.B.D. 455.

Statute.—The principle appearing to have been laid down in *Couch v. Steel* (3 E. & B. 402),

that, whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damage against the person on whom the duty is imposed, questioned by all the judges in *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441.

Statute of Frauds.—1. K. informed his daughter and her intended husband that he had bought a house which should, in the event of the marriage, be his wedding present to his daughter. After the marriage, the daughter and her husband entered into possession of the house, a lease of which K. had bought, subject to payment of certain instalments. K. paid all instalments which fell due in his lifetime, and died leaving a sum of £110 still to be paid, which fell due after his death. *Held*, that possession following K.'s verbal promise took the promise out of the Statute of Frauds; and that K.'s agreement was to give a house free from incumbrances, and that, therefore, the £110 must be paid out of K.'s estate.—*Ungley v. Ungley*, 5 Ch. D. 887; s. c. 4 Ch. D. 73.

2. In a contract for the purchase and sale of land, the vendor was mentioned only as a "trustee, selling under a trust for sale." *Held*, sufficient under the Statute of Frauds.—*Calling v. King*, 5 Ch. D. 660.

3. Eight persons made an agreement to convey certain land to two of their number, by an absolute deed, and that they should sell the same in lots, and hold the proceeds in trust for the eight. The defendant, in April, 1875, made a verbal offer to W., agent of the owners for the sale of the lots, for some of them. W. told him that he must purchase subject to certain conditions, printed on a plan of the lands, and which W. made known to him. The last condition was to the effect that each purchaser should sign a contract embodying the conditions, and the payment of a deposit and the completion of the purchase within two months from the date of the contract. W. promised to lay the offer before the "proprietors," and soon after wrote the defendant, saying the "proprietors" had accepted his offer, and inquiring about his wishes as to the title. The next day defendant replied that, unless he was at liberty to build or not, the offer had better be reconsidered. The next day W. answered, saying the acceptance was an unconditional one, and

defendant could do as he pleased about building. Soon after, the defendant wrote, declining to go on. In a suit for performance, *held*, that the use of the word "proprietors" sufficiently designated the vendors to satisfy the Statute of Frauds, but that the signing of the contract, as required in the printed conditions, constituted a condition precedent to the completion of the contract, and therefore the defendant was not bound.—*Rossiter v. Miller*, 5 Ch. D. 647.

Trade Mark.—In 1862, S. C. got a patent for a filter, in the name of himself and his son G. C., the plaintiff, then a minor. S. C. died the same year, and G. C. carried on the business and sold filters with the label: "S. C.'s Improved Patent Gold Medal Self-cleansing Rapid Water-Filters." In 1865, the patent ran out, and in 1867, the plaintiff, then of age, altered his label by inserting in it in place of "S. C.'s," "G. C.'s," and placing over it a medallion with the words, "By Her Majesty's Royal Letters Patent." In 1876, the defendant's relatives and former employees of the plaintiff, began in the same town making filters very much like plaintiff's, but with this label: "S. C.'s Patent Prize Medal Self-cleansing Rapid Water-Filters, Improved and manufactured by W. & Co." *Held*, dissolving an injunction granted by Bacon, V. C., that the label was not a trade-mark, but a description only, that the defendant's label was not a fraudulent imitation of plaintiff's, designed to cheat the public, and that the plaintiff could have no standing in court by reason of the fraudulent representation of on his label that the patent was still subsisting.—*Cheavin v. Walker*, 5 Ch. D. 850.

Trust.—1. A testator appointed real estate to N subject to a term of years, vested in trustees, who were directed to raise a sum of money therefrom and to pay the income of it to certain life-tenants. This was done, and on the death of the life-tenants, who all survived N, *held*, that the personal representative of N was entitled to the principal of the fund.—*In re Newberry's Trust*, 5 Ch. D. 746.

2. All benefits derived by trustees from the trust-property accrue to the *cestui que trust*, even though the benefit was secured by the trustees appearing as actual owners; and in case of breach of trust by trustees for their own benefit, no lapse of time can validate the trans-

action.—*Aberdeen Town Council v. Aberdeen University*, 2 App. Cases, 544.

RECENT UNITED STATES DECISIONS.

Evidence.—Indictment for maliciously threatening to charge a person with a crime, with intent to extort money. *Held*, that evidence of the truth of the charge was admissible on the question of intent.—*Commonwealth v. Jones*, 121 Mass. 57.

Foreign Attachment.—A salary due to an officer from a municipal corporation may be holden by process of foreign attachment. Otherwise of a salary due from the State.—*Rodman v. Musselman*, 12 Bush, 354. The former proposition is denied in *Wallace v. Lawyer*, 54 Ind. 511.

Foreign Judgment.—A declaration in an action on a foreign judgment must show that the court by which it was rendered had jurisdiction of the cause of action, as well as of the defendant's person; and the former is not shown, though (*semble*) the latter may be, by setting out the record of the judgment.—*Gebhard v. Garnier*, 12 Bush, 321.

Frauds, Statute of.—1. A written memorandum of a pre-existing verbal contract, made after breach of the contract, but before action brought, and signed by the party to be charged, satisfies the Statute.—*Bird v. Munroe*, 66 Me. 337.

2. The defendants ordered lumber of plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut into sizes required by defendants, who agreed to take it when notified that it was ready. The lumber was selected, cut, and notice was given to defendants; but, before they removed it, it was accidentally burnt. *Held*, that the contract was one of sale within the Statute; that the title to the lumber had not passed; that there was no acceptance nor receipt, and that the defendants were not liable for the price agreed to be paid.—*Cooke v. Millard*, 65 N. Y. 352.

Fraudulent Preference.—The rules of a stock exchange board provided that any member becoming insolvent might assign his seat to be sold, and the proceeds should be applied to the benefit of members to whom he was indebted, to the exclusion of outside creditors. The purchaser could not become a member until elected. *Held*, that a sale and disposition of the proceeds under the sale did not constitute a fraudu-

lent preference, and that the assignee in bankruptcy of a member whose seat had been so sold could not recover back debts paid to other members out of the proceeds.—*Hyde v. Woods*, 94 U. S. 523.

Grand Jury.—An indictment for burglary committed in a building owned by a corporation was found by a grand jury, two of whose members were stockholders of the corporation. *Held*, no ground for quashing the indictment.—*Rolland v. Commonwealth*, 82 Penn. St. 306.

Husband and Wife.—A husband and wife are jointly liable for a trespass committed by the wife in his absence, but by his order.—*Handy v. Foley*, 121 Mass. 259.

Indictment.—1. An indictment for murder "by firing a pistol," not showing how the deceased was injured by such act. *Held*, bad.—*Shepherd v. The State*, 54 Ind. 25.

2. A statute provides that any person who having a husband or wife living, marries another person, "shall, except in the cases mentioned in the following section, be deemed guilty of polygamy." The following section excepts persons whose husband or wife has been absent for seven years, and is not known to be living. *Held*, that an indictment on the statute need not negative the exception.—*Commonwealth v. Jennings*, 121 Mass. 47.

Insurance (Fire).—A policy of insurance on buildings was conditioned to be void from the time that the property insured should be believed on or taken into possession or custody under any proceeding at law or in equity. An execution was issued and delivered to the Sheriff, on a judgment rendered in a proceeding to enforce a mechanic's lien on the buildings; and the sheriff advertised the buildings for sale under the execution, on a certain day, without taking possession in the meantime, and before the day, the buildings were burnt. *Held*, that the insurers were liable.—*Manufacturers' Ins. Co. v. O'Maley*, 82 Penn. St. 400.

Insurance (Life).—1. A condition in a policy of life-insurance, making it void if the assured shall "die by his own hand, sane or insane," takes effect if he kills himself while wholly bereft of reason.—*De Gogorza v. Knickerbocker Ins. Co.*, 85 N. Y. 232.

2. A child, though of age, has as such an insurable interest in the life of his parent.—*Reserve Mutual Ins. Co. v. Kane*, 81 Penn. St. 154.

Jury.—1. In an action by a wife to recover damages for selling liquor (beer) to her husband, a juror testified, on the *voir dire*, that he thought the business of making and selling beer was a "perfect nuisance, and a curse to the community;" that he was bitterly opposed to it, and would do all in his power, except raising mobs, to break it down. *Held*, that he was incompetent to act as a juror.—*Albrecht v. Walker*, 73 Ill. 69.

2. At the trial of a civil action for conspiracy, the defendants having been previously convicted on an indictment and imprisoned for the same conspiracy, a person who has expressed an opinion that one of the defendants has been sufficiently punished, and who has signed a petition for his pardon, is incompetent as a juror.—*Ashbury Ins. Co. v. Warren*, 66 Me. 523.

3. The drinking of intoxicating liquor by a jury, even in a capital case, does not of itself vitiate their verdict.—*Russell v. The State*, 53 Miss. 367.

4. If the record in a criminal case recites that the jury were "duly sworn," it is sufficient; but if it purports to recite the oath and does not follow the statutory form, it is error.—*Miles v. The State*, 1 Tex. N. S. 510. So if it does not show that they were sworn at all, but merely that they were "empaneled."—*Rich v. The State*, *ib.* 206.

Landlord and Tenant.—The owner of land who forcibly enters thereon, and ejects, without unnecessary force, a tenant at sufferance, who has had reasonable notice to quit, is not liable for an assault.—*Low v. Elwell*, 121 Mass. 309.

Indictment.—An indictment for larceny of bottles of brandy is not sustained by proof that the prisoner drew the liquor from casks into bottles which he took with him for the purpose.—*Commonwealth v. Gavin*, 121 Mass. 54.

Larceny.—The stealing, at the same time and place, of several articles belonging to several persons, is but one offence, and a conviction of larceny of one of such articles is a bar to an indictment for larceny of another.—*Wilson v. The State*, 45 Tex. 76.

Malicious Prosecution.—If A. makes a false and malicious charge against B, by reason whereof B is arrested and indicted, A is liable

to B for malicious prosecution, though the facts charged by him did not amount to an indictable offence, and B was acquitted on that ground.—*Dennis v. Ryan*, 85 N.Y. 385.

Mandamus.—Mandamus lies against the owners of a cemetery, to compel them to permit the burial of a person whom the owner of a lot in the cemetery has a right to bury there.—*Mount Moriah Cemetery Association v. Commonwealth*, 81 Penn. St. 235.

Master and Servant.—The engine in a factory was moved from one part of the building to another, and thereby its shaft was left projecting into a room where it had not been before, and a person employed in that room, while attending to her usual duties the next day, the shaft not having been cut off as it should have been, was injured by it. *Held*, that the owner of the factory was liable.—*Fairbank v. Haentsche*, 73 Ill. 236.

Municipal Corporation.—A city has not, unless specially empowered by its charter, power to establish fire limits, and to declare wooden buildings within such limits to be nuisances.—*Fye v. Peterson*, 45 Tex. 312.

New Trial.—1. A verdict cannot be set aside because one of the jury was an infant, if his name was on the list of jurors returned and impanelled, though the losing party did not know that he was an infant until after verdict.—*Wasson v. Feeney*, 121 Mass. 93.

2. A and B were indicted jointly. A was convicted and B acquitted. *Held*, that A might have a new trial on showing that B could give material evidence for his defence, as he could not, by any diligence, have obtained B's evidence before.—*Rich v. The State*, 1 Tex. N. S. 206.

Officer.—An office was tenable for six years, and until a successor should be elected and qualified. Before the term expired, a successor was elected and commissioned, took the oaths of office, and died. *Held*, that, on the expiration of the term, there was a vacancy, and that the incumbent did not hold over.—*State v. Seay*, 54 Mo. 89.

Partnership.—The partnership of A and B was dissolved by the death of A; and B afterwards carried on the same business in partnership with C. *Held*, that a partner retiring from another firm which had had dealings with A and B, was not bound to notify B of his retire-

ment, nor liable on a contract afterwards made by the remaining members of his firm with B and C.—*Gaar v. Huggins*, 12 Bush, 259.

Party Wall.—A, owning two adjoining lots of land, conveyed one to B, by deed duly recorded, containing this clause: "It is agreed that the partition wall of any building hereafter erected on the granted premises may be placed half on the granted premises and half on the adjacent lot; and the owner of such lot shall, whenever he uses the wall, pay half its cost." B built a party wall accordingly. A afterwards conveyed the adjacent lot to C, who conveyed to D, who used the party wall. *Held*, that he was liable to B, either on the covenant in the deed from A to B, or on an implied assumpsit for using B's property.—*Richardson v. Tobey*, 121 Mass. 457.

Railroad.—1. A receiver of a railroad was appointed in a suit, brought by holders of bonds of the railroad secured by mortgage, to foreclose. *Held*, that he should pay, out of the net earnings of the road, wages due, at the time of his appointment, to laborers and other employees for the building and operation of the road, before paying anything to the bondholders.—*Douglass v. Cline*, 12 Bush, 608.

2. The conductor of a railroad train is bound to keep order on the train, and to protect passengers, to the best of his ability, against assaults by other passengers; and if he does not use reasonable exertions to do so, the railroad company is liable.—*New Orleans, St. Louis & Chicago R.R. Co. v. Burke*, 53 Miss. 200.

Tax.—Assessments for making roads were laid on the abutters in proportion to the frontage of their estates on the road. *Held*, that this system was unequal and unconstitutional, as applied to rural or suburban property.—*Seely v. Pittsburgh*, 82 Penn. St. 360.

Witness.—A and B were jointly indicted. A's wife was admitted as a witness for the State. *Held*, error, and not cured by the subsequent entry of a *not. pros.* against it.—*Dill v. The State*, 1 Tex. N. S. 278.

GENERAL NOTES.

In the year 1823 some curious evidence was given before a Committee of the House of Commons appointed to inquire into the existing mode of engrossing bills, with the view of ascertaining whether it was susceptible of altera-

tions with advantage to the public service. The Parliamentary Counsel to the Treasury said: "I have always found the oldest hands the most legible; the court hand, which was the original hand for records, was, perhaps, the handsomest hand that ever was written; the present engrossing hand results from the court hand; I find it more easy to read the engrossing or the Court hand than any other hand whatever." An officer of the Court of the Court of Common Pleas gave evidence to show that modern writing would not remain legible any length of time as compared with the "court hand." There is no doubt that the writing and the ink in England four centuries ago were admirable.

—Mr. James W. Gerard, of the New York bar, was in a case where his client, plaintiff, sat beside him, holding a gold-headed cane. The merits were with the plaintiff, but the jury went out and remained out. Eleven of them were in favor of the plaintiff, but the remaining man would not listen to reason, nor did he seem at all inclined to give any ground for holding out. They so remained for a great length of time. At last this one was induced to say why he would not agree with the others. 'I never will find a verdict in favor of a man who carries a gold-headed cane.' This still checked the others; and one of the eleven seemed to begin to waver; and appeared to give in to the propriety of the principle which was involved in this ostentatious exhibition of a gold-headed cane; but he, significantly, called the obstinate one aside, and told him how he himself, while they were all in court, had particularly observed and been offended at this gold-headed cane, and experienced a similar feeling of repugnance against the plaintiff; and that this had caused him to pay particular attention to the cane, and he had ascertained, as a fact, that it was not gold—only pinchbeck—mere brass metal. The obstinate jurymen accepted this assurance, and agreed, with his fellows, in finding a verdict for the plaintiff.

A CURIOUS WILL.—We take from the *Boston Advertiser* the following account of the mode in which a testator punished his avaricious relatives by a clause in his will which was made to depend upon their conduct. The *Advertiser* says:—"A curious will has just been settled in Berlin, containing a moral worth a wider circulation than a miser's last statement often

obtains. The poor man died, when, to general surprise, it was found he had left 34,000 marks. The 30,000 in a package, signed and sealed, was to be given to his native town in Bavaria; 1,000 each to three brothers, and 1,000 to a friend with whom he had quarreled. It was stipulated that none of the four should follow the body to the grave, which suggestion the three brothers gladly accepted, but the quarreler walked alone and forfeited his 1,000 marks, for the sake of paying a last mitigating honor. When the package was opened for the town, it disclosed another will, giving the 30,000 to any of the four who should disregard the stipulation."

ENGLISH LAW.—The *Solicitors' Journal* thus speaks of the growth of English law during the past year: "As to the growth of English law during the year, there is little to be said. The last session produced several administrative acts, such as the Prison Act and the Solicitors' Examination Act; but, as regards alterations in the substance of the law, it was almost a blank. There were two or three comparatively small changes in real property law, an amendment of the Factors' Acts, and a useful consolidation of the Settled Estates Acts, but little more. Nor can we point to many judicial decisions of wide-reaching scope or great importance. The recently devised doctrine of the fiduciary relationship of the promoter has been again laid down; and the doctrine of contempt of court, which at one time threatened to assume alarming proportions, has been opportunely checked by the Court of Appeal, which, in reversing a singular decision of Vice-Chancellor Malins, stated that 'the exercise of this arbitrary jurisdiction ought to be most jealously and carefully guarded;' that a court 'ought not to resort to it except in cases where no other remedy is to be found;' and that it was 'a power which ought only to be used in extreme cases.' It is in lengthy criminal inquiries and in ecclesiastical law cases that the year has been mainly memorable. The case of *Clifton v. Ridgdale* has probably settled for some time the questions as to external observances; and the case of the Rev. Arthur Tooth, who after being 'attached by his body until he should have made satisfaction for his contempt,' succeeded in placing his heel on the neck of Lord Penzance, has brought home to the public at large a profound conviction of the mysterious uncertainty of ecclesiastical law."

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ENGLISH PLEADINGS.

The Judicature Act made a clean sweep of the system of special pleading once so famous and so formidable in England. Under the provisions of that Act no particular form of pleading is necessary. Those who come before the Courts are directed to set out their ground of action concisely and clearly. But notwithstanding the freedom enjoyed under the Statute, there is a tendency at times to relapse into the prolixity of the discarded system of pleading. In a recent case of *Davy v. Garrett*, before the Lords Justices, the appeal referred solely to a question of pleading. The plaintiffs, *Davy & Co.*, in stating the causes of action against the defendants, delivered a claim of forty-three pages in length, in which they went into numerous transactions in detail, and set out the whole or parts of some thirty letters, and other documents. One of the defendants objected that this elaborate pleading was prolix and embarrassing, and offended against the rules of the Judicature Act, by which it is expressly ordered that every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved; while by another rule it is ordered that any expense caused by unnecessary prolixity of pleading shall be borne by the party offending. Vice-Chancellor Hall deemed the pleading admissible on the ground that the circumstances of the case were special and peculiar, and it was almost impossible to say what might or might not be relevant or necessary. The Judge remarked that it is not easy to please a defendant. If the statement of claim is too long, he calls it prolix; if it is very brief, and the case goes to trial, he will object that he has not had notice of the precise nature of the claim against him.

The defendants, however, appealed, and the effect of the recent decision of the Lords Justices is that the Vice-Chancellor has been overruled, and the forty-three paged pleading struck from the record. In delivering judgment, Lord Justice James referred in pointed

terms to the necessity of guarding against abuses. "The Court must take care," his Lordship said, "that pleadings shall not be allowed to degenerate into the offensive practice formerly in force. We must not be driven to confess, as Oliver Cromwell did, with a sigh, in reference to his ineffectual attempts to reform the law and procedure of this country, that the sons of Zeruiah are too hard for us. I, for my part, do not mean to succumb to their devices." His Lordship, no doubt, speaks with the knowledge acquired by long experience of the traps and snares that once beset the path of the pleader, and his views will secure approval. It may be remarked, however, that, judging from the statistics given in our last issue, simplification of procedure has in no way diminished the length of trials.

CONVENTIONAL PRESCRIPTION.

The case of *Bell v. Hartford Fire Insurance Co.*, which is noted in the present issue, presented a question of some novelty. To an action on a policy, the defendants pleaded the conventional prescription of the policy, in which it was provided that no suit shall be "sustainable unless commenced within twelve months next after the loss shall have occurred." The plaintiff answered that the conventional prescription was interrupted in consequence of the Company having tendered a certain sum in settlement. Judge Dunkin refrained from stating a rule as to the liability of conventional prescription to interruption. His Honor remarked that it may or may not be interrupted, according to the precise circumstances of each case. But in the present instance the Company was protected by a clause very strongly drawn, making the mere lapse of time conclusive evidence against the validity of the claim. Under these circumstances, it was held, the tender of money, at once refused, did not interrupt the prescription.

RIGHTS OF RAILWAY BONDHOLDERS.

We print in this issue an important judgment rendered by Chief Justice Meredith in the case of *Wyatt v. Senecal*, affecting the rights of railway bondholders. The case is also of general interest to hypothecary creditors where any considerable part of their security depends on immovables by destination. The learned Chief Justice sustained the proceeding in revindication taken by a bondholder to prevent rolling stock from being removed from the railway.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Quebec, Feb. 8, 1878.

MEREDITH, C. J.

WYATT V. SENECALE.

Railway Bondholders, Rights of—Saisie-Conservatoire.

Held, that a holder of railway bonds has the right, by conservatory process, to prevent rolling stock which is hypothecated for the payment of the bonds, from being removed from the road.

MEREDITH, C. J. This case comes before the Court upon a motion to quash the writ of *saisie-revendication* therein issued.

The declaration alleges that the plaintiff is the holder of certain bonds duly issued by the Levis & Kennebec Railway Company in virtue of various acts of the Legislature of this Province; that by law, and by the tenor of the said bonds, the railway belonging to the said Company, and all the rolling stock, and equipment thereof, became, were, and are mortgaged and hypothecated in favour of the said plaintiff, for the amount of the said bonds, and of the interest due, and to become due thereon.

The declaration further alleges, that for some time previous to the institution of this action, the defendants were in possession of the said railroad, and of all the rolling stock belonging to the same,—and that the defendants, with intent to defraud the plaintiff and to deprive him of his just rights as a mortgagee of the said road, had caused part of the rolling stock, to wit, nine platform cars, to be moved from the said railway, and to be placed on the Grand Trunk Railway at the St. Henri Station, with the intention of causing them to be sent to the Acton Station, on the Grand Trunk Railway, at a distance of more than 100 miles from the Levis & Kennebec Railway.

Upon an affidavit alleging these facts, the plaintiff obtained a writ of *Saisie-Revendication*, under which the said platform cars have been seized; and the defendants now move that the writ, so obtained, may be quashed, on the ground that, even according to the allegations of the plaintiff's declaration, the plaintiff was not entitled to a writ of *Saisie-Revendication*, and more particularly that the present case is not one of those in which a writ of *Saisie-Revendication* is allowed by Article 866 of the Code

of Procedure, which is in the following words: "Whoever has a right to revendicate a moveable, may obtain a writ, for the purpose of having it attached, upon production of an affidavit, setting forth his right and describing the moveable so as to identify it. This right of attachment in revendication may be exercised by the owner, the pledgee, the depositary, the usufructuary, the institute in substitutions, and the substitute."

The plaintiff, it must be admitted, is not an "owner, depositary, usufructuary, institute or substitute" within the meaning of that article. It is true, however, that under the Quebec Railway Act of 1869, railways have the power of pledging their property; but the plaintiff never had possession of the platform cars now seized, and therefore cannot, either under the Common Law or under the Code, have the rights of a pledgee.

On the other hand, there can be no doubt that the plaintiff has a hypothec for his bonds; and I believe it is not denied that that hypothec extends to the rolling stock. Moreover, under the 4th Section of the 36th Victoria, Chapter 45, the bonds "constitute a privileged claim on the moveable property of the said Company."

Such being the case, the plaintiff contends he must have some means of protecting the privilege and hypothec which he holds under the law.

The defendants answer that the plaintiff can protect his hypothecary right now sought to be enforced by a writ of *capias* under Article 800. But the plaintiff replies that the effect of a writ of *capias* would be simply to keep the defendants within the Province, and that that would be of no advantage to him,—and that, at any rate, any remedy he may have against the defendants' persons ought not to interfere with his remedy for the protection of the property in which the law gives him an interest.

This is the first case, so far as I know, in which the question now to be decided has been discussed; and it is certainly by no means free from difficulty. It does, however, appear to me that the right which in the present case the plaintiff has as an hypothecary creditor, was in effect very nearly the same as the privilege which an unpaid vendor who had sold on credit was allowed under the 177th Article of our Custom.

The unpaid vendor, who had sold for ready money, had a right to proceed under Article 176 as owner; his position, therefore, would be quite different from that of the present plaintiff, who is not and does not claim to be the owner.

But the unpaid vendor, under a credit sale, had merely a privilege on the proceeds of the sale of his goods, in the same way as the plaintiff would have a privilege upon the proceeds of the hypothecated property if it were brought to sale. The unpaid vendor, under a credit sale, was not an owner, pledgee, depositary, usufructuary, institute, or substitute, within the meaning of Article 866 of our Code of Procedure, and yet he was constantly allowed to protect his privilege by a *saisie-conservatoire*, which in this district was called a *saisie-revendication*, and which differed but little, if at all, in legal effect, from the process now before the Court.

In three cases reported (2 L. C. J., p. 101), it appears to have been decided by Mr. Justice Mondelet and Mr. Justice Smith that an unpaid vendor, who had sold on credit, might seize the goods sold, in the hands of the vendor, who had become insolvent.—(Lower Canada Jurist, vol. 2, p. 101.)

A decision to the same effect was rendered by Mr. Justice Badgley in *Le Duc v. Tourigny* (5 Jur. 123), and by Mr. Justice Monk in *Baldwin v. Binmore* (6 Jur. 297)—the process being spoken of in the two cases last mentioned as a *saisie-conservatoire*.

In the following years, in this district, in the case of *Poston v. Gagnon* (12 L. C. Rep. 252), the plaintiff, an unpaid vendor, who had sold on credit, sued out a *saisie-revendication*; and the only question which seems to have been discussed, was as to whether the plaintiff had a right to a *saisie-revendication* without an affidavit.

Sir A. A. Dorion, in rendering the judgment of the Court of Appeals in *Henderson v. Tremblay* (21 Jur. p. 24), referred approvingly to the judgments in *Torrance v. Thomas*, *Leduc v. Tourigny*, and *Baldwin v. Binmore*, above cited, observing:—"Les tribunaux du pays ont souvent permis aux parties intéressées de pratiquer des *saisies-conservatoires* pour protéger, dans des cas analogues, des droits qu'elles étaient exposées à perdre."

The judgment of the Court of Appeals in

Henderson v. Tremblay, itself, has an important bearing on this case.

The plaintiff in that case, as an unpaid vendor, had sued out a *saisie-revendication*; the Court of Appeals declared that the sale was on credit, and therefore that the plaintiff was not in a position to exercise the right of *revendication*, but they at the same time said, that although the attachment by the plaintiff was "in the nature of a *saisie-revendication*, it would nevertheless avail to him as a *saisie-conservatoire*."

The contention of the plaintiff is that if, as the defendants maintain, he be not entitled to a *saisie-revendication*, under Article 866, then that he must have a remedy under Article 21, which declares that "whenever the Code does not contain any provision for enforcing or maintaining some particular right or just claim, or any rule applicable thereto, any proceeding adopted which is not inconsistent with law, or the provisions of this Code, is received and held to be valid."

The plaintiff further contends that the remedy which he has adopted protects his rights without interfering with the rights of any other person,—and such seems to me to be the case, for the effect of the writ, so far as we now can see, is merely to prevent the carrying away of property hypothecated in favour of the plaintiff; and as to the name given to the writ, I do not think it ought to materially affect the question to be decided.

It is to be recollected that when the judgments of the Superior Court, of which I have spoken, were rendered, the defendants could urge, and did urge, the provision of the 27th George III., declaring that attachment before judgment should be allowed in certain cases only; and that the case of the unpaid vendor, who had given credit, was not one of those cases. Also that we had not, at the time of the rendering of those judgments, any general provision, such as is to be found in Article 21 of the Code of Procedure already cited; and if our courts, without any provision of law, such as that last mentioned, and notwithstanding the 27th George III., allowed the unpaid vendor the benefit of a *saisie-conservatoire* for the protection of his privilege, it seems to me that the courts now ought to allow the plaintiff, as a privileged and hypothecary creditor, a like

remedy for the protection of his rights. For these reasons, although the case (which, so far as I know, now presents itself for the first time,) is not free from difficulty, I deem it my duty to reject the motions of the defendants to quash the *saisie-revendication*.

Motions rejected.

Hon. G. Irvine, Q.C., for plaintiff.

Mr. Bossé, Q. C., for defendant.

Montreal, Jan. 31, 1878.

DUNKIN, J.

BELL v. HARTFORD FIRE INSURANCE CO.

Conventional Prescription—Interruption—Tender.

Held, that a tender (not accepted) of money by an insurance company in settlement of a loss is not an interruption of the conventional prescription of one year under the policy.

The plaintiff sued to recover a loss under a contract of fire insurance. An interim receipt had been granted, but the fire occurred before the policy issued. The Company, defendant, among other grounds of defence, set forth that the interim receipt was given subject to all the conditions of a future policy; that of these one was that no proceeding for recovery of a claim should avail unless commenced within twelve months after the loss, "and should any suit or action be commenced later, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding"; and prescription was pleaded accordingly.

The plaintiff answered this plea by saying that the Company, on the 18th April, 1874, (within the year after the loss, and also within a year before action brought) tendered him \$587.15, and that the term of the conventional prescription set up by the first plea was thereby extended so as to count from that date, and therefore did not avail as against this suit.

On this point, the following remarks were made by

DUNKIN, J. As to the first question, the Court is not prepared to say that conventional prescription is not liable to interruption. It may be or may not be, according to the precise circumstances of each case. The clause here invoked as creative of it is very strongly drawn—"no suit shall be sustainable unless com-

menced within 12 months next after the loss shall have occurred"; and if commenced later "the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." Interruption against this is claimed simply by reason of a tender of money made unconditionally, and as unconditionally at once refused. Such tender was an indiscretion from the present point of view of the Company defendant. But it took place months before the expiration of the year, and neither caused nor tended to cause delay as to prosecution of the claim. On the whole, the Court fails to see in it any interruption of the prescription here in issue.

Action dismissed.

Judah, Wurtels & Branchaud for plaintiff.

Carter & Keller for defendants.

Montreal, Feb. 5, 1878.

BAINVILLE, J.

HILYARD v. HARMBURGER.

Affidavit under Sec. 105, Insolvent Act of 1875—Prothonotary.

The affidavit required for a writ of attachment under the Insolvent Act may be sworn before the Prothonotary or his Deputy, notwithstanding the omission to include this officer in the enumeration in Section 105 of the Act.

Keller for plaintiff.

Kerr & Carter for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Jan. 29, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

ROBERTSON et al. (plffs. below), Appellants; and LAJOIE (deft. below), Respondent.

Warehouse Receipts—Warehousemen—Pleading.

Held, 1. That a document in the following form was a warehouse receipt, and not a mere delivery order:—

"Received from Ritchie, Gregg, Gillespie & Co., on storage, in yard Grey Nun Street, the following merchandise, viz. :—

"(300) Three hundred tons No. 1 Clyde Pig Iron, storage free till opening of navigation,

"Deliverable only on the surrender of this receipt properly endorsed.

"Montreal, 5th March, 1873."

THOMAS ROBERTSON & Co.

2. That the parties signing such warehouse receipt, unpaid vendors of the iron, could not pretend that it was not a warehouse receipt inasmuch as they were not warehousemen, as against a holder of such receipt in good faith.

3. That such warehouse receipt may be transferred by endorsement as collateral security for a debt contracted at the time, in good faith, the pledgee having no notice that the pledgor is not authorized to pledge, the proof of such knowledge being on the party signing the receipt.

4. That an obligation contracted at the time may be made to cover future advances, but not past indebtedness.

The Chief Justice and Mr. Justice Cross, although agreeing with the majority of the Court as to this view of the law, would have reversed the judgment inasmuch as the declaration alleged it was for advances, without setting forth that it was for advances subsequent to the transfer of the warehouse receipts.

The majority of the Court were of opinion that the declaration was defective, but as the declaration had not been specially demurred to on this ground, and as the defendants had allowed the plaintiff on the issues to prove the fact that advances to a much greater amount than the value of the iron mentioned in the receipts had been made by Nelson Davis to Ritchie, Gregg, Gillespie & Co., subsequently to the transfer of these receipts, the defect in the declaration was covered. The majority of the Court, therefore, maintained the judgment of the Court below, and dismissed the appeal with costs.

Judgment confirmed.

H. L. Snowden for Appellants.

Abbott & Co. for Respondent.

HEARLE (plaintiff below), Appellant; and
BREND (defendant below), Respondent.

Revendication—Service of Declaration—Warehouse Receipts given by other than a Warehouseman.

1. It is not necessary that a copy of the declaration in an action of revendication should be served at the prothonotary's office by a bailiff; it is sufficient that a copy be left at the office.

2. Warehouse Receipts granted without authority by the President and Secretary of a company not doing business as warehousemen are invalid.

This was an action in revendication, by which the appellant as endorsee of five ware-

house receipts given by the Moisie Iron Company to John McDougall, claimed 1100 tons of iron of the value of \$29,500. Two of the receipts were signed by W. M. Molson as President of the Company, and three by Roberts as Secretary.

The defendants filed an exception to the form, alleging that a copy of the declaration was not served upon them. A certificate of the prothonotary was produced, establishing that a copy of the declaration had been lodged in their office within three days from the service of the writ of summons. The defendants also pleaded to the merits, that they were not warehousemen and could not give warehouse receipts; that their President and Secretary had no authority to grant such receipts; that the receipts were not negotiable instruments.

The Court below, holding that under Arts. 850 and 868, the copy of the declaration in an action of revendication must be served by a bailiff, and that it was not sufficient that it should be lodged in the office by any other party, dismissed the action.

DOMON, C. J. Art. 850 of the Code of Civil Procedure provides that in cases of *saisie-arrest* before judgment the declaration may be served at the same time as the writ, or by leaving a copy thereof at the Prothonotary's office within three days after the seizure has been made. And Art. 868 applies the provisions of Art. 850 to cases of revendication. The same rule is laid down in Art. 804 as to the service of the declaration in cases of *capias*, although in somewhat different terms. This mode of serving the declaration is not new. The three articles above referred to are taken from the Consol. Stat. L. C., c. 83, s. 57. Under this statute it was formally decided by Mr. Justice Monk in *Raphael v. McDonald* (10 L. C. Jurist, 19), by Mr. Justice Badgley in *Brakadi v. Bergeron*, and by the Court of Appeals in the same case (10 L. C. Jurist, 18, 117), that the declaration need not be served by a bailiff, but that it is sufficient if it is filed at the prothonotary's office within the three days after the seizure or service of the *capias*. The majority of this Court have no hesitation in holding that the filing of a copy of the declaration in the prothonotary's office was a sufficient service both under the terms of the Code and the jurisprudence which has sanctioned this practice.

On the merits we are all agreed that the action must be dismissed, as there is no evidence whatsoever that the Moisie Iron Company carried on the business of warehousemen, nor that the President and Secretary of the Company were ever authorized to sign warehouse receipts to pledge the Company's property.

The judgment will, therefore, be confirmed, but not for the reasons assigned by the Court below.

Judgment confirmed.

Doutre & Co. for the Appellant.

Kerr & Carter for the Respondent.

[IN CHAMBERS.]

Montreal, Nov. 19, 1877.

CROSS, J.

Ex parte JOHN THOMPSON, for a writ of Habeas Corpus.

Habeas Corpus—Variance between Judgment and Commitment.

1. A judgment condemning the defendant to pay certain costs specified, and concluding with the words "the whole with costs," includes the necessary future costs of executing the judgment, and a commitment including such additional costs is not in excess of the judgment.

2. A habeas corpus will not be granted where the petitioner is detained in a suit for a civil matter, before a Court having jurisdiction over such matter.

The petitioner represented that he was confined in the Common Gaol for the District of Montreal under a Sheriff's warrant, dated 18th April, 1877, based on a judgment of the Superior Court of same date, declaring absolute a rule for coercive imprisonment obtained by Henry Jevons, plaintiff, against the petitioner as defendant, ordering him to be imprisoned until he shall have paid \$200.64 of a debt, with interest from the 9th January, and costs of the rule, with \$41.10 taxed costs in the cause.

The principal reason adduced in support of the application was that the terms of the commitment were in excess of those of the judgment. The excess specified was that the commitment required the petitioner to pay, in order to be released, the costs of the rule \$13.15; costs of writ, \$2; and costs of warrant, \$4; also costs of arrest, \$5.

CROSS, J. The strict rules applicable to convictions by magistrates and tribunals of inferior or limited jurisdiction cannot be allowed to govern the present case. The detention of

the applicant is for debt, and the process is in a suit for a civil matter. It is contended that the specific cause of detention should have been set forth in the Sheriff's warrant, and that it should have appeared to be one for which the law authorized imprisonment. It is fairly answered that the Court which rendered the judgment, and from which the process issued, is a Superior Court having jurisdiction over the subject matter, in favor of which there is a presumption that its jurisdiction has been rightfully exercised. The warrant and judgment authorize the prisoner's detention for a cause over which the Superior Court had jurisdiction. Whether their judgment was erroneous, or their authority irregularly exercised, cannot at present, in my opinion, be made the subject of a valid complaint before a Judge of this Court in Chambers.

If, as in the case of Cutler determined in the last Term of the Queen's Bench, Criminal Side, there was no judgment ordering the imprisonment, then I would liberate in the absence of a legal cause of detention. But here it is otherwise. There is a judgment ordering the imprisonment, and the Court had authority over the matter.

As to the reason, that the warrant or commitment is in excess of the judgment, I do not find this to be so in fact. The costs of the writ for *contrainte*, the Sheriff's warrant and the bailiff's fees being included are a necessary incident, a sequence of and comprised within the terms of the judgment of the 18th April which specifies all costs made up to that date, and passing a condemnation specific for everything incurred up to that date, concludes in the words, "the whole with costs." These terms apply to and include the necessary future costs of executing the judgment. The extent of these costs cannot at the time be foreseen nor specified, yet they are a necessary incident to carrying into effect the judgment which would in all like cases have to be borne by the plaintiff, unless they could in this manner be collected from the defendant. The practice of the Civil Courts does not require these costs to be assessed beforehand, nor could they well be so assessed.

Application refused.

Euclide Roy for the petitioner.

St. Pierre for the Crown.

[IN CHAMBERS.]

Montreal, Feb., 1878.

MONK, J.

Ex parte Healey, Petitioner for Writ of Habeas Corpus.

Habeas Corpus in Civil Matters.

A writ of Habeas Corpus will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the Court from which it issued.

RAYNEY, J. The case was argued before Mr. Justice Monk, who, being indisposed, has requested me to say that he is of opinion that the writ should be refused, and his order to that effect is endorsed on the application. As I was present at the argument, and as he conferred with me on the matter, he has requested me to state his reasons for refusing the writ, and in which I concur. I have also consulted the other Judges of this Court, save Mr. Justice Tassier, with whom I have not been able to confer, on account of his being at Quebec. Those present here agree with me in the opinion expressed in the present case.

This is an application to a Judge in Chambers for a writ of Habeas Corpus. The cause of commitment was alleged to be a warrant of the Sheriff setting up a writ of *contrainte par corps* addressed to the said Sheriff, wherein it was declared and set forth that, "by judgment rendered in the said Superior Court at Montreal, on the 1st day of June, 1876, on a rule for *contrainte par corps*, obtained by the plaintiffs against the defendant in a certain cause No. 2,581, wherein the Delaware, Lackawanna & Western Railway Company, a body politic and corporate, duly incorporated, according to the laws of the State of New York, one of the United States of America, is plaintiff, and Christopher Healey, of the City and District of Montreal, trader, defendant, the said Christopher Healey was condemned to pay and satisfy to plaintiff the sum of \$352, currency, with interest thereon from the sixteenth day of November, 1875, day of service of process in this cause, until actual payment and costs of suit, and it was further declared and adjudged that the said defendant was guilty of fraud, by reason of his purchase from plaintiff and non-payment thereof after the delivery of the goods to him; it was ordered under the said judgment

that the said Christopher Healey be imprisoned in the common gaol of this district for the term and period of three months, unless such debt and costs be sooner paid." The warrant then relates that this judgment was confirmed in appeal, that the said defendant had failed to pay the debt and interest as ordered by the said judgment, and that the Sheriff is commanded to take the body of the said defendant, "and to detain him in the common gaol of the district for the term and period of three months, unless he pays to said plaintiff the said sum of \$352 with interest as aforesaid, and also the sum of one dollar for the writ of *contrainte*." The warrant, therefore, commands the bailiffs and gaoler to whom it is addressed to take the body of the said Christopher Healey, if he be found in the district, "and to detain him in the common gaol of the said district for the term of three months, unless he pays the said plaintiffs the said sum of \$352 with interest as aforesaid, also the sum of one dollar for the writ of *contrainte par corps*."

Two grounds are urged by the petitioner in support of his application: first, that the imprisonment is commanded on grounds of alleged fraud, without in any way showing that the petitioner had been guilty of said offence; second, that it is not alleged where the debt referred to in the commitment was contracted, and that there is no ground or reason set forth to warrant the imprisonment.

The rest of the reasons are merely formal.

The judgment was also produced, and it sets forth the purchase by defendant of goods to the value of \$352 on credit on a certain day; that on that day defendant knew that he was unable to meet his engagements; that he concealed the fact from the plaintiffs with intent to defraud them, and that he had not paid them. The Court, therefore, condemned the said defendant to pay and satisfy to plaintiffs the said sum of \$352 currency, with interest thereon until payment of costs of suit; and further declared defendant to be guilty of a fraud by reason of his said purchase and non-payment after delivery of said goods to him, and ordered that defendant be imprisoned in the common gaol of this district for the term and period of three months, unless the said debt and costs be sooner paid.

At the argument, it was contended—1st, that

the warrant was not in conformity with the judgment, for that it ordered the payment of \$1 for subsequent costs; 2nd, that the *contraints* could not go for interest and costs, but only for the debt; 3rd, that the warrant should have set forth the amount of costs; and 4th, that the commitment being for fraud, it was for a criminal or supposed criminal offence, and consequently that the application was not made under the authority of Sections 20 to 25, Cap. 95, C. S. L. C.

The scope of this argument is somewhat wider than is suggested by the reasons of the petition; but taking the argument as it was offered, it may be as well to dispose of the last point. This is beyond all question an application for a *habeas* under the sections somewhat incorrectly classed as being those relating to *habeas corpus ad subjiciendum* in civil matters. In other words, it is not an application in a case of detention for any criminal or supposed criminal offence. We have therefore to meet the prohibition of Section 25, Cap. 95, C. S. L. C. "Nothing in the five next preceding sections contained (that is, all those relating to so-called civil matters) shall extend to discharge out of prison any person charged in debt or other action, or with process in any civil suit." This is clearly a process in a civil suit. The prisoner is held on the warrant of the Sheriff acting under a writ in execution of the judgment. The fraud justifies this sort of execution; but the imprisonment is not a punishment for the fraud; it is only an execution. As C. J. Jervis said in a similar case, "the object was to get the money by coercing the person of the debtor." *Dakins' case*, 18 C. B. 92. Whether, then, the process be good or bad we cannot touch it. This was decided in *Barber v. O'Hara*, 8 L. C. R., p. 216. There was also the case of *Donaghue*, which was brought before Chief Justice Duval on application for a writ of *habeas corpus*, and the application was renewed before Chief Justice Meredith. Both applications were refused, Chief Justice Duval holding that a writ of *habeas corpus* cannot be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested is irregular, and Chief Justice Meredith said that even if the arrest were irregular, yet if it does not appear to be out of the scope of the jurisdiction of the Court

from which it issued, it cannot be declared void, and the prisoner consequently cannot be liberated by *habeas corpus*.

Two cases of *Exp. Cutler* and *Exp. Martin* decided in the Court of Queen's Bench, Crown side, last September, were cited. In the first place it is to be observed that they were decided by the Court and not by a judge in Chambers, and this might perhaps alter the question; but it does not appear that they laid down any principle at variance with the view now taken. It was there held that there was no judgment to warrant the detention, and therefore that it was not really a process in a civil suit, but at most the semblance of one.

Several English cases were cited, and particularly *Bracey's case*, 1 Salkeld, 348, and *Sancher's case*, 1 Ld. Raymond, 323. These cases both turned on the excess of jurisdiction under a special authority. The former was the authority of commissioners of bankruptcy, the second that of an ecclesiastical court. The authority of the Superior Court—the great court of original civil jurisdiction in civil matters, which has a superintending and reforming power, order and control over all courts and magistrates, and all other persons and bodies politic and corporate in the Province, saving only this Court, is not a special but a general power. These cases, therefore, do not apply in any way. The case which has gone furthest in England is that of *Dakins*, already mentioned; but that was a case of privilege. The petitioner had a right to be discharged owing to a personal privilege, and the Court, therefore, gave relief by way of *habeas*, because he was plainly detained without right, not on a judgment, but by an execution beyond the authority of an inferior tribunal.

Writ refused.

Carter, Q.C., and *Devlin*, for Petitioner.
St. Pierre for the Crown.

RULES OF PRACTICE.

The following Rules of Practice made by the Court of Queen's Bench, Appeal side, at Montreal, on the 16th March last, have not yet been published:—

Present:—DORION, C. J., MONK, RAMSAY, SANBORN, TESSIER, JJ.

REGULAS GENERALES.

On the first day of each term, the Clerk of

Appeals shall lay before the Court a list of all cases pending before the Court, in which no proceedings have been had for more than a year, indicating the name of the parties and of their respective counsel, the nature and date of last proceeding had in such case; and such cases shall be considered to have been deserted, and the Court may without any demand to that effect order the records to be transmitted to the Court below.

This rule to be enforced in cases now pending as well as to future cases from and after the first day of March, one thousand eight hundred and seventy-eight.

In all cases of Appeal and Error, the parties may in lieu of factums, as now required, file a special case setting forth the judgment or judgments appealed from, and so much of the pleadings, evidence, documents and orders in the cause as they may deem necessary to enable the Court to decide the questions at issue, together with such propositions of law or fact as may be relied upon by the parties respectively, and such special case shall be considered as common to both parties, and will entitle the counsel engaged in the case to the same fees as if separate factums had been filed.

The cases or factums shall be printed on paper of eleven inches by eight inches and a half, the type to be small pica leaded face, and every tenth line numbered in the margin.

(Certified,)

L. W. MARCHAND,
Clerk of Appeals.

CURRENT EVENTS.

ENGLAND.

NEWSPAPER REPORTS.—In the case of *Uill v. Hales et al.*, decided by the Common Pleas Division of the English High Court of Justice on the 30th ult., there were three actions for libel brought by the plaintiff, a civil engineer, against the three defendants as printers and publishers of the *Daily News*, the *Standard* and the *Morning Advertiser*. Certain persons who had been employed by the plaintiff in the construction of a railway in Ireland applied to a metropolitan police magistrate for a criminal

process against the plaintiff, to recover from the plaintiff the wages due to them. The magistrate dismissed the application on the ground that he had no jurisdiction, and a report of the proceedings was printed and published in the defendants' newspapers, which was the libel complained of.

At the trial the jury found the report in the newspapers to be a fair and impartial report of what took place before the magistrate. The judge ruled the report to be privileged, and his decision was sustained by the Common Pleas Division. The *Solicitors' Journal* says that this case, though likely to be cited as a leading case, and overruling, as Lord Coleridge said, what has been over and over again laid down by great judges, is really only a return to the old lines. In 1796, in *Curry v. Walter* (1 Esp. 456; 1 B. & P. 525), an action was brought in respect of "an account published in the newspaper called the *Times*," of an application for a criminal information. It was ruled by Eyre, C. J., and afterward by the Court of Common Pleas, that the action did not lie. This ruling, which was very shortly reported, though approved in *R. v. Wright* (8 T. R. 298), soon became a mark for judicial attack. Lord Ellenborough, in *R. v. Fisher* (2 Camp. 563), and Lord Tenterden, in *Duncan v. Theatres* (5 D. & R., at p. 479), distinctly disapproved of it. Lord Campbell, in *Lewis v. Levy* (E. B. & E. 537), with characteristic caution, expressly left the point open. Lord Chief Justice Cockburn, in *Wason v. Walter* (L. B., 4 Q. B., at p. 94), with equally characteristic boldness, predicted that, if any action or indictment founded on an *ex parte* proceeding were to be brought, it would probably be held that the true criterion of the privilege was, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

SIR EDWARD CREASY.—Sir Edward Creasy, who recently died in England, was for two years Chief Justice of Ceylon, and had occupied an inferior judicial position in England. He is best known to Americans by his works, "The Rise and Progress of the British Constitution," and "The Fifteen Decisive Battles."

A JUDGE SHOT AT.—A cablegram states that Sir George Jessel, Master of the Rolls, was shot at on the morning of February 22nd, while alighting from a cab at the Rolls Court, by one Dudwell, supposed to be insane, whom the Judge had on a previous occasion ordered to be removed from the Court for causing a disturbance.

UNITED STATES.

THE VALUE OF A LAWYER'S SERVICES.—Judge Freedman, in charging the jury in a case tried last week in the New York Superior Court, made some pertinent remarks upon the interesting subject of the value of a lawyer's services. Litigants, and those who have occasion to apply to the profession for service or advice, are apt to estimate the worth of what is done for them by the time occupied in doing it, and, therefore, are very much dissatisfied when a charge of a considerable amount is made for what apparently occupied only a few hours or a few days of the counsel's time. But, as Judge Freedman says:

"To become proficient in the necessary knowledge relating to all these matters involves years of self-denial, close application and devotion, and a study of almost a life-time. A lawyer's compensation is, therefore, not to be measured merely by the time he actually spends in the discharge of his duties. An advice given in a short interval, but founded upon years of previous acquaintance with the question involved, may, in an important case involving large interests, be worth quite a sum of money."

The popular feeling in reference to lawyers' charges is, however, to some extent encouraged by the action of certain members of the bar who, to secure business, underbid their brethren, and certain others who habitually make no charge for advice, even to those able and willing to pay.—*Albany Law Journal*.

RICHES AND INSANITY.—The connection of riches and insanity has been forcibly made manifest by several cases pending before the courts of New York during the past month or two. The Lord-Hicks case and that of Miss Dickie have given the newspapers an opportunity to attack the laws relating to lunacy and the estates of persons of unsound mind, and to propose all sorts of changes therein for the purpose of protecting those whose property is liable to tempt their immediate relatives to construe eccentric acts into evidences of insanity. That the laws need amendment is un-

doubtedly true, but they should not be so altered as to take from the immediate relatives of persons believed to be insane all right to appeal to the courts of law and authorities for power to control such persons and their property. While the immediate relatives of an individual may not always be solicitous after his welfare, as a rule they are so, and they certainly are more to be trusted than a stranger who volunteers to interfere. The subject is one of difficulty, and under the best devised systems will occur cases of wrong and oppression.—*Id.*

WOMEN AS ADVOCATES.—The Washington House of Representatives, Feb. 21, passed the bill admitting women to practise before the Supreme Court of the United States:—Yea, 169; nays, 87.

TESTIMONY OF ACCOMPLICES.—In *State v. Hyer*, 10 Vroom (39 N. J. Law), 598, it is said that although the practice of courts is to advise juries not to convict a defendant on the uncorroborated testimony of an accomplice, yet a conviction founded on such evidence is strictly legal. This doctrine is supported by high authority. In *Atwood and Robbins' case*, 1 Leach's C. C. 464, which was a trial for robbery from the person, the only evidence to identify the prisoners and connect them with the robbery was the testimony of an accomplice, that he and defendants were the persons that committed the crime, and a conviction was held legal. In *Rez v. Durham*, 1 Leach's C. C. 478, the case was permitted to go to the jury upon the sole evidence of an alleged accomplice, the judge stating that the twelve judges who sat in the *Atwood and Robbins' case* were unanimously of the opinion that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law. In *Rez v. Jones*, 2 Campb. 431, Lord Ellenborough remarks, "no one can reasonably doubt that a conviction is legal, though it proceed on the evidence of an accomplice. Judges in their discretion will advise a jury not to believe an accomplice unless confirmed." In *Rez v. Wilkes*, 7 C. & P. 272, Alderson, B., said to the jury, "you may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony." To the same effect see *Reg. v. Farlar*, 8 C. & P. 108. In *Reg. v. Stubbs*, 33 E. L. & Eq. B. 552, it is said "it

is not a rule of law that accomplices must be confirmed in order to render a conviction valid, but it is usual in practice for the judge to advise the jury not to convict on such testimony alone, and jurors generally attend to the judge's direction, and require confirmation, but it is only a rule of practice." In 1 Wharton's Cr. Law, § 783, the author states that the preponderance of authority in this country is that a jury may convict a prisoner on the testimony of an accomplice alone, though the court may at its discretion advise them to acquit unless such testimony is corroborated on material points, and numerous authorities from different States are given in support of this statement. In Pennsylvania, the statute establishes a different rule. If the credibility of the accomplice be otherwise impeached, it is ground for new trial. *People v. Haynes*, 55 Barb. 450.—*Albany Law Journal*.

THE LATE MR. WELLES.—Gideon Welles, ex-Secretary of the Navy, who died recently, studied law in the offices of Chief Justice Williams and Judge Ellsworth, of Connecticut, and was admitted to the bar, but he was never engaged in active practice.

EXAMINATION OF THE ACCUSED.—A short time ago a bill was introduced in the English Parliament, the object of which is to permit the questioning, on oath, of persons accused of crime, and the motion for its second reading gave rise to an extended discussion. The arguments advanced for and against the bill were exceedingly able, and show that those members who took part in the debate have made themselves familiar with the subject. The advocates of the measure contended that the result following its adoption would be the surer conviction of the guilty and the greater chance of escape of the innocent. That an innocent prisoner of intelligence would be benefited was admitted, but it was claimed that the proposed law would change the onus of proof from the prosecution, where it now is, to the defence. The bill provides that a refusal of the accused to testify shall not create a presumption against him, but as the inference to be drawn from the prisoner's action must be drawn by a jury, it was alleged that this provision would amount to nothing. The opinion of the chief judge of the New York Court of Appeals that "the change has not given very

great satisfaction" here, and that of the Chief Justice of New Jersey, that, while the "system, with respect to the elucidation of truth, has worked well," it has led to a great amount of perjury, was quoted in opposition to the measure. The prospects of the success of the bill seem remarkably good, as it was passed to a second reading by a majority of 109. The result of an experiment of a similar character, made here, has proved satisfactory, and we are confident that very few would wish to have the old rule restored. The law may, indeed, sometimes work harshly in this way. When a prisoner is put upon the stand to testify, the prosecution is able, under pretence of impeaching him as a witness, to introduce testimony in relation to his character. Thus it is dangerous for a person whose reputation has been bad to testify in his own behalf. But if he does not testify, the jury, in a doubtful case, are inclined to infer guilt, though the statute contains a provision that refusal to testify shall raise no presumption. This, however, is considered a minor evil, as it affects only those who have by their course of life deprived themselves of public sympathy. To an innocent person of previous good character, accused of crime, it is a very great advantage and undoubtedly reduces to almost nothing the chances of conviction in such cases. That the guilty are much more frequently convicted than in former times is also very certain.—*Albany Law Journal*.

QUEBEC.

COURT OF QUEEN'S BENCH, QUEBEC.—Feb. 22, Hon. Atty.-Gen. Angers introduced a bill to amend Chap. 77, C. S. L. C., respecting the Court of Queen's Bench. The object is to enable the Court to sit longer on the Civil Side. To carry out this object it is proposed to appoint a sixth Judge.

RECENT UNITED STATES DECISIONS.

Trial.—The want of any record of an arraignment, even in a capital case, is not error, if the record shows a plea of not guilty; otherwise, if it does not.—*Early v. The State*, 1 Tex. N. S. 248.

Trade-mark.—An official inspector of fish, who brands the packages of fish packed by him in the course of his duty with his official brand,

does not thereby gain a private right in such brand as trade-mark.—*Chase v. Mayo*, 121 Mass. 343.

Watercourse.—Trespass by a riparian proprietor for carrying away gravel from the bed of the stream. The Court took judicial notice that the stream was not navigable, and held that, this being so, the fact that its bed was not included in the United States Survey, nor in terms conveyed to the riparian owner, did not exclude his ownership *ad filum aquæ*.—*Ross v. Faust*, 54 Ind. 471.

NEW PUBLICATIONS.

Mr. Joel Prentiss Bishop, the well-known author, has recently published a work on "The Doctrines of the Law of Contracts." In his preface he says:

"This book is the outgrowth of a plan to collect, in simple and compact language, and arrange in an order of my own, the essential doctrines of the law of contracts; referring mainly to the larger books, which the reader was expected to consult as he had occasion, for illustration and the adjudged cases. But on proceeding to do what I had thus undertaken, I found the plan impossible with me, though doubtless it would not be with an author of greater ability. When I felt, in those books, for the ribs in the body of the law of contracts, and for the spinal column, I could not distinguish rib or backbone from muscle.

"Should I abandon altogether what I meant? That I would not do. So I have traveled through the adjudged cases, collected the leading doctrines, and arranged from them what I deemed to be a skeleton of the law of the subject, put with it so much of flesh in the form of illustration as seemed imperative, and draped the whole with as thin a gauze of needless words as I deemed the public taste would bear. My object has been to present the body of the law of contracts, without its bloat, in form to be examined and re-examined, by old and young, the learned and the unlearned,—the student, the practicing lawyer, the judge, the man of business,—as any skeleton is, by all classes of enquirers.

"But why refer to so many cases? Because, first, the foot-notes are in nobody's way,—they do not injure the book for those who do not

wish to use them. Secondly, those who have occasion to look beyond the general doctrines, which the text supplies, into their minuter forms, or to see further illustrations of them, have here the directions provided for ready use. Thirdly, practitioners who, in arguing before a court, desire to rely on a proposition in the book, have thus the means in hand for making the proposition good."

DISTURBING THE DEAD.—The New York *Sun* has the following: A survivor of the wreck of the iron-clad *Tecumseh*, who lives in this city, received a letter on Monday from the United States Attorney for the Southern District of Alabama, informing him of the granting of a perpetual injunction against junk dealers, and all other persons, restraining them from interfering with the remains of the iron-clad and two hundred men whose bones lie in her hulk at the bottom of Mobile Bay. The *Tecumseh* was sunk by a torpedo in the channel, off Fort Morgan, Mobile Bay, in the fight under Admiral Farragut on the 5th of May, 1864, and, of the two hundred souls on board, only seven escaped. They found egress through a hatch eighteen inches square, in the turret. The wreck has lain ever since deep down in the quicksand where the vessel sank,—a vast iron coffin for the men who went down in her, no attempt having been made to recover their bodies. Secretary Robeson sold the wreck, last winter, to junk dealers, for old iron. It being necessary to make some six hundred blasts to obtain the iron in pieces, which would have scattered the bones of the patriots in all directions, steps were taken to stop this desecration of the patriots' remains, and a temporary injunction was obtained. An appeal from the proceedings was taken by the junk dealers, and the United States Circuit Court for the District of Alabama has ordered that the injunction be perpetual.

GOING BEYOND THE JURISDICTION.—A creditor in Maysville, Ky., sought to get an attachment on the ground that his debtor had said, "I'm going to sell out and go to hell," thus justifying a belief that he intended to quit the State. The Justice decided that the remark was no indication that the debtor meant to go out of Kentucky.

The Legal News.

Vol. I.

MARCH 9, 1878.

No. 10.

BUSINESS IN APPEAL.

The delays of justice have at all times been the subject of serious complaints, and the grievance has often been of great magnitude. It is not possible entirely to avoid the inconvenience, but it is not the less the duty of the legislator to adopt every possible means of facilitating the transaction of legal business. Within the last twenty years much has been accomplished in this direction by cutting down the delays of procedure; but all this fails to secure the desired result so long as obstacles occur in the hearing and adjudication of cases. A mere cry for "despatch" is idle. Despatch without opportunity for due deliberation would be a misfortune. On the composition of the judicial body, and the facilities they have for hearing and deliberating, we must depend for securing the only kind of despatch that is to be desired.

It is not our intention for the moment to refer to the Courts of original jurisdiction. The serious difficulty with us at present is as to the business in appeal, and in the remarks we have to make we do not desire to throw any kind of blame on the Judges of the Court of Queen's Bench. In a previous number we have shown that the arrears by which the Court is now encumbered are not of their making, and that in the face of an immense increase of business the Court has not lost ground. The practical question therefore resolves itself into this: Is it impossible for the five judges to clear off the arrears? If they cannot, some temporary expedient should be devised in order to accomplish this object. But we do not think this is necessary, and we have reason to believe that the judges are not of opinion that it is. It requires no very deep study of our system to discover very formidable impediments to the despatch of business, which being cleared away would give the Court an opportunity of applying its energies more effectively. In the first place the judges are by law compelled to reside in two towns 180 miles apart. Secondly, there are but four terms of eleven days each for hearing cases in Montreal. Thirdly, practically the whole five judges are obliged to sit in every

case, otherwise they are liable to re-hearings, which take up much time. Fourthly, by reason of the necessity of the five judges all sitting at once, it is impossible to hold extra terms of the court, appeal side, without breaking in on the vacation or on the terms of the criminal court.

The remedy for all these evils is simply to allow the judges to fix their own sittings, to make the quorum of the Court on the appeal side four, and to abolish all restrictions as to residence.

Some prejudice exists as to the quorum of four. It is said that if the judges are equally divided, it is the judgment of the inferior Court that prevails and not that of the Court of Appeal. We see no harm in that. It is a result directly in accordance with principle. The theory is that the presumption of law is that the judgment is correct, and it should not be touched in appeal unless it be clearly wrong. How can it be said to be clearly wrong if one-half of the Court of Appeals thinks it right? The presumption then in favour of the judgment should prevail. But we go further and say that this chance in favour of the successful litigant in the Court of first instance, constitutes a wholesome check on litigation. There is, however, another thing to be considered, and it is that four is arithmetically the best quorum for a Court of Appeal. If the judges in Appeal are equally divided, as has been said, the judgment below should be confirmed, and we have thus a decision of three judges to two. If again there is a division, but not an equal one, you have perhaps four to one, and at any rate three to two. But by our system the judgment is often rendered by three against three, and when complicated by a decision in Review, it may be by three against six.

As far as authority may have weight, it is in favour of a quorum of four. When Sir Louis Lafontaine, no mean authority as regards the organization of civil courts, re-organized the Courts in 1849, he made four the quorum in Appeal. This was altered owing to an outcry, which continued to increase rather than to abate after the alteration. The truth is it was a criticism of the uninformed. Again, recently when the Judicial Committee was re-organized, the paid judges were appointed to the number of four, and the Court usually sits with four Privy Councillors.

A Bill, fortunately not passed, and which we hope will be reconsidered, raises the number of judges in Appeal in the Province of Quebec to six, and peremptorily fixes the quorum at five, while it does not allow the judges to fix their own time of sitting. The effect of this is to give room for two majorities in the Court, thus keeping the jurisprudence on points of difficulty in almost endless uncertainty, and it also exposes the Court to the inconvenience of being unable to sit if one judge is ill or absent for any cause.

INJURIES RESULTING IN DEATH.

An interesting decision on the subject of life insurance, re-affirming an old principle, was pronounced recently by the Supreme Court of the United States, in the case of *The Mobile Life Insurance Co. v. Brame*. The action was brought by the Company to recover the sum of \$7,000, under the following circumstances. It had insured the life of one McLemore, a citizen of Louisiana, for various sums, amounting to \$7,000 in favor of John P. Kennedy, and while the policies were in force, the defendant, Brame, wilfully shot McLemore, inflicting upon him a mortal wound, from the effects of which he died two days afterwards. The Company being compelled to pay the amount of the policies, sought to recover the same from Brame, through whose "illegal and tortious" act the loss was alleged to have been incurred. In the Court below the action was dismissed, and this decision has been affirmed by the Supreme Court, the ruling being that "by the common law no civil action lies for an injury which results in death; and the death of a human being, though clearly involving pecuniary loss, is not ground for an action of damages." It was intimated that the Act, 9 & 10 Victoria (1846), giving an action in certain cases to the representatives of the deceased, which has been incorporated into the Statutes of many of the States, did not include a claimant such as the one in this action. Mr. Justice Hunt, in delivering the opinion of the Court, remarked that the authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death—that it was impossible to regard it as open to question. He quoted Hilliard on Torts,

where the rule is laid down as follows: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action of damages." Numerous authorities are referred to, and the Judge quoted several other decisions in the same sense. In the case of *Green v. The Hudson R. R. Co.*, 2 Keyes, 300, the plaintiff alleged that his wife was a passenger on the defendants' road, and by the gross carelessness and unskillfulness of the defendants, a collision occurred which resulted in the death of his wife," whereby he has lost and been deprived of all the comfort, benefit and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," &c. The defendants demurred to this on the ground that the allegations constituted no ground of action, and the demurrer was sustained. Having referred to other decisions to the same effect, the Judge continued: "The relation between the insurance company and McLemore, the deceased, was created by contract between them. But Brame was no party to the contract. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental, a remote and indirect result, not necessarily or legitimately resulting from the act of killing."

The Legislature has stepped in to remedy the hardship that might arise from a rigid adherence to the old rule of law, but the Court held that the statutory provision did not apply. "By the common law," Judge Hunt observed, "actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or by the heir. By the Act of Parliament of Aug. '21, 1846 (9 & 10 Vict.), an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the Statutes of many of our States, and among others, into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and in default of these relatives, in favor of the surviving father and mother. The case of a creditor, much less a remote claimant like the plaintiff, is not within the Statute."

The point here decided seems to have arisen more frequently than might be supposed, and

therefore is not unimportant to life insurance companies. But the proportion of such cases to the volume of business done is so small, that the adverse decision here referred to can hardly have an appreciable effect upon the prosperity of insurance corporations.

STAMPING NOTES.

The collection of revenue by requiring bills and notes to be stamped is attended by the inconvenience of sometimes involving innocent holders in heavy loss. There may be no intention to do wrong, yet the penalties of the law may be incurred by an oversight or by ignorance of the forms enjoined. A contemporary calls attention to a case which came before the Court of Common Pleas of Ontario, in which a bank suffered a considerable loss through an irregularity in stamping some customers' paper, whereby an endorser was held to be released. In the case referred to, the note endorsed, but not filled in, was handed by the customers to the bank's agent, who some time afterwards filled it in for the amount of the customers' indebtedness and affixed double stamps, which were then cancelled with the date at which the note was thus completed. The note, however, bore date the day it had first been deposited in the bank, and the Court of Common Pleas held that the bank could not recover against the endorser. It were much to be desired that the necessary revenue could be collected by some method not so perilous to those who innocently go astray; but under present circumstances it is well that persons who have to do with bills and notes should be well-informed and careful to observe the forms enjoined by law.

THE PARLIAMENTS OF FRANCE.

[American Law Review.]

The lawyer who seeks in his studies something besides authorities to be cited before the court *in banc*; who takes a wider interest in the history of jurisprudence than as it illustrates the growth of the doctrine of uses and trusts or the development of the law of bailments; who thinks that the influence of lawyers in the political history of Europe is as important as the law of mortmain or the rule in Shelley's case,—must have his interest ex-

cited by the very different political and social development of the courts of France and England. That the jurisprudence of France was based upon the Roman law, modified by a strange and confused compound of local customs, while English jurisprudence had its origin in the common law of some of the German tribes, is not the most marked distinction between the judicial systems of those great and neighboring nations.

The English courts have administered a uniform system of law throughout the kingdom; their judges have been taken from members of the profession, of whatever original social rank, who had acquired prominence in the practice of the law. No Englishman has been "swaddled and rocked and dandled" into a judge. English, like American, lawyers have been active in the political affairs of their country. The English courts have often done great work for the restraint of tyranny, for the development of good government. Some of their decisions are among the landmarks of triumphing liberty. But the courts have held no political power. Only incidentally have they been brought into contact with the political side of the government.

In all this the history of France was far different. There, separate courts administered different systems of law. The judges became a caste, transmitting or selling the succession to the ermine as a part of their estate. Their political power grew to overshadow their judicial duties in importance. The highest court at times endeavoured to seize the reins of government, and, if guided by more wisdom, might have become a check on the power of the king, which would have changed the nature of the French monarchy.

The origin of the French Parliaments is partly lost in the obscurity of antiquity. It can, however, be traced vaguely.

The extensive powers of the feudal nobility in France included judicial authority; and most disputed questions in the early feudal period came before the Lords' Courts for decision. The right of *basse, moyenne, et haute justice* over his serfs and villeins was as precious to the seigneur as his right to take part of their fruits and crops, his right to confiscate their property when they left his territory, his right to aid when his son was knighted or his

daughter wed, his right to make his subjects grind at his mill or follow his banner.

The King's Court or Council possessed, however, an undefined jurisdiction, chiefly over the king's private domain, or in cases where he might be deemed to be specially concerned. This council was composed of the great nobles and officers of the State, to whom those versed in the law were gradually added as advisers or assistants.

Philip Augustus, in his resolute attack on feudal power, endeavored to organize the ancient King's Council or Parliament into a more effective body. He formed what he called a Court of Peers. Six lay and six ecclesiastical lords sat in this court, and their first case was the trial of King John of England for his failure to perform his duty to his feudal superior. The English king refused to heed the summons of herald or bailiff, unless he could be assured of a safe return. Philip informed him that this would depend upon the sentence imposed in the case. Unwilling, apparently, to intrust his cause to the doubtful decision of a court of his enemies, John was condemned by default; and for his contumacy, for murder and treason, he was sentenced to death, and to the forfeiture of all his fiefs in France. A court that began with the trial of a king might hope for great power and judicial might in the future. The Court of Peers was, however, soon merged in the more fully developed Parliament. St. Louis and Philip the Fair carried on these endeavors to form a tribunal which should derive its authority from the king. By the fourteenth century, the judicial power was chiefly vested in a body of magistrates forming part of the central government. The people welcomed the change from the uncertain justice which had been meted out by the feudal courts, from the necessity of bribery, the certainty of injustice, and the possibility of every wild and bloody vagary of decree and punishment, to the orderly and honest judgment of the courts of the king.

The transfer of judicial power from untutored nobles to trained lawyers was, moreover, a necessity attending the development of the law. However well fitted to pass upon some question of the law of the chase, to adjudge the delinquency of some villein failing to render the feudal dues, to adjust the quarrels of the chief equerry with the chief huntsman, the nobles

found themselves sadly perplexed, and still more bored, when complicated cases came before them to be decided by yet more complicated rules of law. In the good old times they had appealed to the judgment of God, to hot ploughshares and boiling water, to dispose of troublesome questions of fact, and had imposed the duty of a jury on the Almighty; but such pious and convenient modes of determining the right and exposing the wrong were going out of vogue. Some base-born *roturier*, in a mean black gown, quoted to them Latin they did not understand and rules of law they could not comprehend. To leave to such as he to decide the confused laws they cited was the natural tendency of the lords who had once delighted in *justice, haute, moyenne, and basse*.

Jealousy of the power of the great nobility excited the resolve on the part of the king to absorb judicial power. The clergy, also, were restrained in the functions which had fallen largely into their hands when they were the sole possessors of learning. An ordinance of Philip the Fair, in 1287, provides that, if there are any clergy among the bailiffs or sergeants, they shall be removed, and that those who have causes before the Parliament shall have laymen for their solicitors. An organized judicial force soon throws all legal business into the hands of a trained class of men; and the lawyers constituted a special body in France earlier than in England.

The Parliament of Paris, *La Cour du Roi*, as formally organized by St. Louis and Philip the Fair, possessed both original and appellate jurisdiction; and it added legislative functions to judicial responsibilities. Its jurisdiction, like that of most courts, grew by legal fictions. Cases that might affect the king as suzerain were styled *cas royaux*. The king's courts, the Parliament or inferior magistrates subject to its authority, insisted on trying them, to the exclusion of the feudal tribunals. This power was found as elastic as the similar jurisdiction of the English Court of the Exchequer. By the writ of *committimus*, a large class of cases, over which the Parliament claimed appellate jurisdiction, were brought before it to be tried in the first instance. Those who were subject to the king alone, living within his private domain, must of course be tried by his judges. The rights and guilt of peers could be deter-

mined only by the Parliament. Apart from this, a right of appeal to the King's Parliament from almost all of the inferior trial courts, was gradually established—from those held by the king's baillis or presidencies or by the prévôts, and from those held by the feudal lords or their representatives. The Parliament thus absorbed a jurisdiction greater than that of any English Court. It had, moreover, a power much like that of the Roman prætor. In cases not already provided for, the parliament could declare that, until the king should otherwise order, certain questions should be decided in certain ways. Such a right is very near to that of actual legislation. The body of the Roman law sprang from such an origin; and, though to a much less degree, the French courts made a portion of the laws which they were to administer.

The court was divided into sections having different functions. All of these sat together to consider the subjects which required the attention of the entire Parliament. With little change, save in the number of its members, it preserved the form in which it was organized by Philip the Fair, in the ordinance of 1302, down to the time when, with royalty and nobility, it perished in the French Revolution.

Various Chambers of Inquiry—*Chambres des Enquêtes*—heard appeals from the baillis, prévôts, and other inferior tribunals. The result of their deliberations was reported to the great chamber, where the decision was pronounced which the *Chambre des Enquêtes* had reached. The Chamber of Petitions—*Chambre des Requêtes*—was originally organized to hear and answer petitions presented to the Parliament. It finally heard most of the civil suits of original jurisdiction which were brought before that court. In these cases, the members of the chamber performed the duties of both judge and jury. The number of the judges might atone for the lack of the more popular element. Some of the cases were heard orally; others were decided on written proofs. The regulation of the practice is too obscure to be clearly understood. The solicitors and advocates seem to have performed their duties in much the same manner as the attorneys and barristers of the English courts.

La Tournelle Criminelle was organized at a later period than the other chambers. It

had jurisdiction of criminal cases, and tried all those brought before the Parliament, except some of special importance,—the trials of nobles, of some ecclesiastics, and of great public officers, which were heard before the great chamber, or all the sections combined. The members of the *Tournelle* varied from twenty to thirty. They did not sit permanently in this court; but were taken from the great chamber and the other branches of the Parliament, in order, as it was humanely stated, "that the habit of condemning men and sentencing them to death should not alter the natural clemency of the judges, and render them inhuman." Despite this merciful provision, prisoners had a trial far different from that secured in England to those accused of crime. The trials were ordinarily had with closed doors and upon written evidence, and there were few of the humane presumptions of the common law in favor of innocence. A majority of only two was sufficient for a conviction.

The highest branch of the Parliament was the great chamber,—*La Grande Chambre*. The first president, nine presidents *à mortier*,—as they were styled from their caps,—and thirty-seven counsellors, of whom twelve were originally in orders, composed this body. Apart from the professional members of the court, the peers of France and the princes of the royal blood had the right to sit in this body. Here the judgments reached by the other sections were brought to be pronounced. Matters of State as well as of law were discussed before it. The suits of the peers of France and actions involving royal rights were here tried.

The Parliament met in the old Palais de Justice,—the palace which unites the France of Saint Louis with France under the presidency of Marshal McMahon. In the Hall of Saint Louis, the meetings of the entire body were held. No hall of justice has witnessed more varied or more tragic scenes. There the Parliament met in its solemn sessions when the wars, the treaties, the finances, and the government of France were discussed, and matters of national importance were adjudged. There, at the beginning of the Fronde, it was sought to establish a new constitution for France, of which the Court should be the executor. There, during the wars of the Fronde, the Parliament received the envoy of Spain, to treat with him

on measures against the king of France. The President, De Mesmes, pathetically asked the Prince of Conti, if a prince of the blood of France would give audience on the *fleurs de lys* to France's most cruel enemy. There it was decreed that no foreigner should sit in the councils of France; that a price should be set on Mazarin's head, and that his noble library of four thousand books should be sold to pay the reward. There it was more nobly determined that the philosophy of Descartes might be taught in the schools. Louis the Fourteenth annulled this decree, and the Jesuits succeeded in having the doctrines exclusively inculcated, that extent is not necessary to body; that thought is not necessary to soul; and that vacuum exists. There the Parliament avenged itself for the contumely it had received from *Le Grand Monarque*, by annulling his will, and recognizing the Duke of Orleans as absolute regent. There it issued its decree against Law's bank, which, if courageously enforced, might have prevented the ruin which resulted from that wildest of financial dreams. There the suppression of the great order of the Jesuits was decreed, and its members exiled from the country. In this chamber, when the conservative, powdered, and gowned aristocrats of the Parliament had been succeeded by the Revolutionary tribunal; when Molé and De Harlay and D'Aguesseau had been replaced by Hermann and David and Fouquier Tinville,—more dramatic trials were had than had ever been conducted by the peers, presidents, and counsellors who sat upon the *fleurs de lys*. The hall was re-christened "La Salle de l'Égalité," and in it Marie Antoinette was found guilty of having been a queen, and condemned for the crime. There Danton pleaded his cause before the Revolutionary tribunal. He raised his voice to such a pitch that it could be heard across the Seine; and his words were listened to by the great crowd which had gathered outside the palace in dismay at the overthrow of the great agitator. The President, Hermann, sounded his bell for him to speak lower. "Don't you hear the bell?" said the President. "The voice of a man who pleads for his life," replied Danton, "may well drown the tinkling of a bell." From this hall the Girondins marched, after receiving sentence of death, chanting the "Marseillaise."

In the *Salle des Pas Perdus*,—the great hall into which the chamber of Saint Louis opened,—Fouquier Tinville had a guillotine erected, so that those on trial could look from the faces of their judges to the doom that was soon to be theirs. But the Committee of Public Safety, when it restricted Tinville to the trial of sixty persons at once, also deprived him of the ever-present sight of the instrument he loved so well. The hall has been sadly changed. The visitor who gazes at reputable-appearing advocates in gowns and caps, sharp-featured notaries, uneasy clients, and wearied judges, sitting in a modern-looking hall, sees little to bring back the parliaments of Paris or the tribunals of the Revolution. The voice of Danton has ceased to vibrate; the eloquence of Harlay no longer delights the ear; the prose of the nineteenth century has replaced the pathos of the eighteenth, and the pride and dignity of the seventeenth.

(To be Continued.)

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Quebec, March 2, 1878.

Present : DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

SARGEANT V. BLANCHET et al.; and BEAUDETTE, plff. en gar., v. REID, deft. en gar.

Demurrer—Appeal—Illegal Issue of Debentures.

The action was brought against the president and directors of the Levis & Kennebec Railroad for damages, for illegal issue of debentures. Beaudette, one of the defendants, sued Reid, the London financial agent of the road, for having issued certain of these debentures in violation of the Company's charter. Reid pleaded to the action *en garantie*, among other things, that the directors authorized the issue, and that Beaudette, as one of a firm, actually accepted a portion of the debentures as collateral security. The plaintiff *en garantie* demurred to this last part of the plea and the demurrer was maintained. The defendant *en garantie* now moved to be allowed to appeal.

Leave was granted.

Quebec, March 4, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

O'FARRELL, appellant; and BRASSARD, respondent.

Appeal to Privy Council—1178 C. C. P.

A motion was made on the part of Brassard to be allowed to appeal to the Privy Council, on the ground that the judgment (*ante*, p. 25) bound the future rights of the bar.

Leave to appeal was refused. The Court held that it had no power to grant leave to appeal beyond the cases mentioned in art. 1178 C. C. P. This case was not within any of them. It bound no future rights of Brassard, and the bar was not a party. The only remedy was for Brassard to apply to the Privy Council for special leave to appeal.

GLEASON and VAN COURTLAND; and MARQUIS and D'ANJOU, T. S.

Seizure by Garnishment—617, 624, C. C. P.—*Appeal*.

Marquis had his domicile in the district of Rimouski. The writ issued in the district of Arthabaska. The *tiers saisi* made his declaration in his own district within the proper delay (Art. 617 C. C. P.), but it was not duly forwarded to the court at Arthabaska. On application the court condemned the *tiers saisi* personally to pay the whole debt unless he made a new declaration and paid all the costs of the *tiers saisis*. The T. S. moved for leave to appeal from this interlocutory judgment.

The motion was granted.

D'Anjou made a similar motion, but he had not made his motion within the delay, and consequently the declaration he made before the prothonotary at Rimouski was invalid. The judgment was therefore in conformity with Art. 624 C. C. P., and leave to appeal was refused.

Doucet and CORPORATION OF THE PARISH OF ST. AMERONIS.

Prohibition—Appeal.

This was an appeal by the Judge of Sessions at Quebec against a judgment on a prohibition directed against him, and prohibiting him from proceeding in a certain case. The party complainant took the case to Review, and was

unsuccessful. Mr. Doucet did not go to Review.

The Court reserved the motion to be decided with the merits.

METHOT and BURKS.

Action of Damages—Title.

An action of damages for an assault. The judgment was confirmed, but the motives of the judgment of the Court below, which appeared to decide a question of property with regard to a wharf where the assault took place, were omitted.

BOUDREAU and VADEBONCOEUR.

Judgment confirmed.

KINGSBOROUGH and POUND.

An action *en déclaration de paternité*. The conclusions of the declaration did not ask for arrears. No notice of this was taken at the argument, and therefore the judgment was reformed with regard to this point only, with costs.

OUELLET and DUTREMBLE.—Confirmed.

LA CORPORATION DE LA VILLE DE ST. GERMAINE DE RIMOUSKI and RINGUET.

Illegal By-Law—Action to recover money paid thereunder.

Action to recover back money paid for licenses. It was not denied that the charge was illegal (34 Vict., Que., C. 2, S. 128,) but it was said that the by-law was not set aside, and could not be attacked incidentally (705 C. M.). The Court held that, even if this article applied to the municipality appellant, the article of the Municipal Code could not be interpreted to say that a by-law in direct opposition to the law must be set aside within three months or thirty days as provided by the statute.

This decision was held not to be in contradiction to the decision in the case of *Parent & La Corporation de la Paroisse de St. Sauveur*, 2 Q. L. R. 258.

Montreal, Jan. 28, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

BECKHAM, (plff. below), Appellant, and FARMER, (deft. below), Respondent.

*Extra work—Defendant's Admission—
Art. 1690 C. C.*

The judgment appealed from dismissed a claim made by the appellant, a builder, for extra work executed for respondent beyond what was comprised in a contract for the erection of a block of tenement houses in Montreal. The *motif* of the judgment was: "Seeing that by article 1690 C. C., plaintiff cannot be allowed to make proof either by parole testimony or the oath of the defendant, of the making and furnishing of the extras, the price whereof is sought to be recovered by this action; doth dismiss," &c.

In appeal the judgment was reversed and the extra work allowed. The judgment is as follows:

"Considering that the respondent has admitted that the appellant had done for him extra works in addition to what was provided for in the contract of the 23rd Oct., 1874, and the value thereof to the amount of \$719.71, and that in view of such admission there is no occasion to apply to the works so admitted the rules of law contained in article 1690 C. C.," &c.

Judgment for \$323.

F. W. Terrill for appellant.

Doutre, Doutre, Hutchinson & Walker for respondent.

ST. PATRICK'S HALL ASSOCIATION (plffs. below), Appellants; and GILBERT and MITCHELL (defts. below,) Respondents.

Builder—Responsibility for Work.

The action was brought by the St. Patrick's Hall Association against Gilbert, and Mitchell, his surety under a contract, claiming damages occasioned by the falling of the roof of the St. Patrick's Hall. Gilbert pleaded that he was not a builder by profession; that the iron supplied by him was good, and that under the contract entered into he was bound to follow the instructions given him by the architect, and was not responsible for the design. Mitchell pleaded similarly that Gilbert was bound to follow the instructions received, and that he was not responsible for the strength of the work. The judgment maintaining the pretensions of the respondents was confirmed.

Judgment confirmed.

J. J. Curran and Doherty for the appellant.

C. S. Burroughs for the respondents.

ST. AUBIN et vir (plffs. below), Appellants; and ST. AUBIN (deflt. below,) Respondent.

Community—Partage—Account.

The appeal was from a judgment of the Superior Court, dismissing the Appellants' action, by which he asked that the respondent be ordered to render an account of the community existing between the late Jean Baptiste Aubin, the father, and the late Sophie Cavallier, his wife, and that he be ordered to make an inventory in due form of the *continuation de communauté*, and to render an account under oath.

The facts of the case were as follows:

On the 18th of November, 1823, a contract of marriage was entered into between Jean Baptiste St. Aubin, of the parish of St. Martin, farmer, and Sophie Cavallier; by which it was stipulated that they should be *communs en biens*; that further, one-third of the immoveable or real rights belonging to Sophie Cavallier should be mobilised, and that all the property and rights real and moveable of Jean Baptiste St. Aubin, both *propres et acquêts*, should enter into the community as *conquêts*, with the exception of a sum equal to two-thirds of the real rights of Sophie Cavallier, which sum so reserved should be the property of Jean Baptiste St. Aubin;

That afterwards, on the 25th November, 1823, said Jean Baptiste St. Aubin and Sophie Cavallier were married;

That of the marriage there was issue five children, to wit, the appellant Sophie St. Aubin, the respondent Jean Baptiste St. Aubin, and Constance, Gertrude, and Luce;

That afterwards, about the 13th March, 1841, said Sophie Cavallier died, having previously made her last will and testament before a notary and witnesses at St. Martin, on the 8th March, 1841;

That by said will Sophie Cavallier bequeathed to her husband during the time he should remain unmarried, the usufruct and enjoyment of all and every her property, moveable and immoveable, on his making a good and faithful inventory thereof, and on his death the remainder to her, said Sophie Cavallier's heirs; and she further named the said Jean Baptiste St. Aubin her executor of the will and testament;

That all the children, issue of the said mar-

riage were minors at the death of the said Sophie Cavallier ;

That the property, real and personal, belonging to the community existing between Jean Baptiste St. Aubin and Sophie Cavallier at the time of Sophie Cavallier's death, was worth \$15,000 cy.

That Jean Baptiste St. Aubin remained in possession of all the estate of the said community, never made any inventory thereof, or of any part thereof ;

That about the 15th of January, 1874, Jean Baptiste St. Aubin died at St. Martin, having previously thereto made his last will and testament, dated 3rd July, 1863, by which he made and constituted the defendant, Jean Baptiste St. Aubin, his son, his universal residuary legatee, and bequeathed to him the rest and residue of his estate ;

That by the default of Jean Baptiste St. Aubin, *père*, to make an inventory of the community theretofore existing between him and his wife, there was a continuation of the said community between him the said Jean Baptiste St. Aubin and his said five children, to wit, amongst others, with the female plaintiff.

Then followed a description of the real estate, and it was alleged that during the continuance of the community, Jean Baptiste St. Aubin, *père*, received the rents and issues thereof, and never rendered an account to any of his children, and never caused an inventory to be taken.

That Jean Baptiste St. Aubin, defendant, accepted the said residuary bequest, and entered into possession of all the properties, moveable and immoveable, belonging to the *continuation de communauté*.

Then followed the allegation of the marriage of the plaintiffs ; then the allegation that the value of the estate and effects of the *continuation de communauté* taken possession of by the defendant Jean Baptiste St. Aubin, was \$25,000.

Then followed allegations with respect to the marriage of the other sisters of the plaintiff.

The defendant pleaded that by deeds passed Francois St. Aubin and his wife sold to their father and father-in-law, Jean Baptiste St. Aubin present and accepting, all their rights of succession, moveable and immoveable, etc., which the said Luce St. Aubin could claim in the succession of her said late mother, and that

afterwards on the 11th of October, 1859, the female plaintiff then being a major, with two of her co-heirs, acknowledged to have sold and transferred to her said father for the price of \$300, all her rights, pretensions and claims in the succession of her late mother, and that afterwards Gertrude St. Aubin, one of the defendants, sold for the price of \$1,000 her rights in the same ; and that by virtue of the said deeds Jean Baptiste had acquired the entire of the goods and estate which his wife Sophie Cavallier had possessed at the time of her decease.

There was then set up the residuary bequest to the defendant, and these were wound up by a *défense au fond en fait*.

To the first plea the appellants demurred, and moreover by a special answer urged the illegality of the deed of sale by the female plaintiff, on the ground of *lésion*.

To these the respondents replied generally.

On the appeal, the appellant said : It is shown clearly that no inventory was ever made by St. Aubin *père*. There is contradiction in the evidence as to the value of the community property, but it is shewn to have been worth more than \$10,000.

Three points present themselves for consideration in this case :

1. Was the *continuation de communauté* existing between J. B. St. Aubin and his child, the female plaintiff, put an end to by the passing of the deed between him and her of the 11th October, 1859 ?

2. Was it necessary for the plaintiffs specially to set up the nullity of that deed in their declaration, and pray by the conclusions thereof that it might be set aside ?

The judgment rendered by DORIOZ, J., and which was confirmed in appeal, was as follows :
La Cour, &c.

Considérant que tous les droits que la demanderesse avait dans la succession de sa mère comprenait sa part dans la communauté qui avait existé entre cette dernier et feu Jean Baptiste St. Aubin, son mari ;

Considérant que par la vente que la demanderesse a faite à son père de tous ses droits dans la dite succession de sa mère, elle s'est dépouillée du droit de demander un compte et partage des biens de la dite communauté, si elle eut existé ;

Considérant que la demanderesse ne pouvait par une réponse spéciale demander la nullité, pour cause de lésion, de la dite vente faite par elle-même, mais que cette demande aurait dû être faite par action principale;

Sans égard à la preuve faite sur la dite réponse spéciale de la dite demanderesse, maintient l'exception péremptoire du défendeur Jean Baptiste St. Aubin, et déboute l'action de la dite demanderesse.

Judgment confirmed.

Kerr & Carter for appellant.

Loranger, Loranger & Pelletier for respondent.

Present: MONK, RAMSAY, TESSIER, CROSS, JJ.,
TASCHEREAU, J. ad hoc.

LAWLOR, (deft. below), Appellant, and *WOODS*, (plff. below), Respondent.

The action, *en déclaration d'hypothèque*, was dismissed by the Superior Court, but this decision was reversed by the Court of Review, and the action maintained. In appeal the judgment was confirmed. The case turned in great measure on a question of good faith.

Lacoste & Globensky for Appellant.

Geoffrion, Rinfret & Archambault for Respondent.

Present: DORION, C. J., MONK, RAMSAY, TESSIER,
CROSS, JJ.

LALONDE et al., (defts. below), Appellants, and *ALABIE*, (plff. below), Respondent.

The action of respondent was on a note. Plea, that the note was given in payment of a threshing machine sold by respondent, and that the machine was a bad one. A question of evidence.

Judgment condemning defendants confirmed.

Duhamel, Pagnuelo & Rainville for Appellants.

Loranger, Loranger & Pelletier, for Respondent.

BEAUPRÉ, (plff. below), Appellant, and *COMPAGNIE DES REMORQUEURS DU PORT DE MONTREAL*, (deft. below), Respondent.

Action for damages alleged to have been caused to the barge *Union* by the tug *Messenger*. Question of proof.

Judgment dismissing the action confirmed, *Tessier, J.*, dissenting.

Duhamel & Rainville for Appellant.

F. X. Archambault and *A. David* for Respondent.

QUIMET, Appellant, and *BERGÉVIN dite LANGÉVIN*, Respondent.

Judgment of Superior Court, Montreal, confirmed.

DOUTRE, (deft. below), Appellant, and *LA BANQUE JACQUES CARTIER*, (plff. below), Respondent.

Action on a note. Plea by the endorser that notice of protest was not given in time; the protest being made 7th December, and the notice, according to appellants, being deposited in the post office only on the 11th. The Superior Court maintained the action, considering the weight of testimony to be on the side of plaintiff. Judgment confirmed.

Doutre, Doutre, Robidoux, Hutchinson & Walker for Appellant.

Lacoste & Globensky for Respondent.

Present: DORION, C. J., MONK, RAMSAY, CROSS, JJ.
LA BANQUE NATIONALE, (plff. below), Appellant, and *CONVERSE*, (deft. below), Respondent.

Action on notes made in the name of respondent by his agent John Converse (son of respondent). Plea, that the notes sued on were not justified nor authorized by any authority given to John Converse. The Court below sustained the plea and dismissed the action. This judgment was reversed in appeal.

Judgment: "Considering that the appellants have proved that John Converse was authorized as the duly constituted attorney and agent of the respondent in this cause to sign the two promissory notes mentioned in the declaration in this cause, and that the said notes were given for matters arising out of transactions connected with the business of the said respondent," &c.

Judgment reversed.

Geoffrion, Rinfret & Archambault for Appellant.
John L. Morris for Respondent.

CURRENT EVENTS.

UNITED STATES.

SPIRITUALISM AND ITS EFFECT UPON WILLS.—In the case of *Leighton v. Orr*, 44 Iowa, 679, one Wolcott had lived for years in unlawful relations with a woman who shared his home, and who claimed to be a spiritualistic medium, and

to have daily communication with his deceased wife, whose memory he greatly revered. During this time she acquired great influence over him, and controlled him to a large degree in the management of his business affairs, and at the same time he was addicted to the use of alcoholic liquors to such extent that he became debilitated in mind and body. Previous to his death he conveyed large portions of his property, for the considerations of "one dollar and friendship," to this woman. The court held that these conveyances should be set aside on the ground that they were procured by undue influence. This case, in one respect, resembles *Lyon v. Home*, L. R., 6 Eq. Cas. 655. The defendant in that action was somewhat celebrated as a spiritualist. The plaintiff sought him and thrust her gifts upon him; in consequence, however, of directions received, as she supposed, through the defendant, from her deceased husband. There were, however, no illegal or immoral relations between the parties. The court held that, owing to the confidential relations between the parties, the burden was on the defendant to support the deeds or gifts, and that he should satisfy the court that they had not been obtained by reason of confidence reposed, or undue influence. In *Robinson v. Adams*, 62 Me. 369, the subject of spiritualism, and its effect on the validity of wills, is extensively discussed, and the conclusion reached that when a will is attempted to be impeached upon the ground that it was the result, to some extent, of assumed spiritual communications with the deceased husband of the testatrix, and of her belief that her son-in-law possessed supernatural power over his wife, and was possessed of devils, the jury must determine how far these beliefs were founded in insane delusion, or exercised undue influence in producing the will. See, also, note to this case in *Redfield's Leading American Cases on Wills*, p. 384.—*Albany Law Journal*.

PROTECTION OF WORKING PEOPLE.—A curious bill has been introduced in the New York Assembly by Mr. Seebacher. It reverses the old order of things, when the poor were ground under foot by the rich, and proposes to place the employer under the heel of the employee. The bill provides that where judgments are recovered for wages for amounts less than \$50, and the execution issued thereon is not paid, the debtor

may be arrested and put in a jail or debtor's prison for fifteen days. By way of compensation it is provided that if, on a trial by jury, it shall be found that the plaintiff was in the wrong, or intended persecution, he may be imprisoned. It will be observed that no evidence of fraud on the part of the employer is required. The measure is evidently a restoration of imprisonment for debt, and it is to be hoped that the Legislature will not sanction a step in so dangerous a direction.

U. S. CASES IN BANKRUPTCY.

Some of the decisions in bankruptcy by courts in the United States admit of more than local application, and, regard being had to the difference in the law, may be usefully consulted. Appended is a digest of such recent decisions as appear to be of general interest:

Bankrupt.—If a bankrupt honestly regards a judgment held by him as worthless, he can omit it from his schedule without being chargeable with false swearing or fraud. If it had value as an asset, it is neither wilful false swearing nor fraud unless the omission to place it in the schedule was intentional.—*In re Winsor*, 16 N. B. R. (W. D. Mich.) 152.

Books of Account.—1. Keeping proper books of account, within the meaning of the Bankrupt Act, may be said to be the keeping of an intelligent record of the merchant's business affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business. A casual omission of an entry, or mistake, would not be conclusive against the bankrupt.—*In re Winsor*, 16 N. B. R. (W. D. Mich.) 152.

2. In order that a merchant or trader should comply with the law requiring him to keep proper books of account, it is not necessary that he should enter therein entries of debts owed by him at the time he went into trade, previously contracted, as well as those incurred in his business as a trader.—*Id.*

Composition.—After a composition in bankruptcy had been confirmed, a petition for a rehearing was filed, pending which the payments became due. Upon notice to all the creditors, the bankrupt was ready to pay all at the time and place notified, and all were there except the petitioning creditors. *Held*, that it was the

duty of the bankrupt, if he could find no one to take the money for the petitioners, to pay the same into the Bankruptcy Court. Upon failure to do so, the unpaid creditors are entitled to a summary order for payment.—*In re Reynolds*, 16 N. B. R. (S. D. N. Y.) 176.

Debt.—When A., at the time he purchases goods of B., intends either in whole or in part not to pay for them, he has "created a debt by fraud," within the meaning of the Bankrupt Act.—*In re Alsberg*, 16 N. B. R. (Del. Dist.) 116.

2. And a like debt is created when the vendor is induced to sell his goods upon the representations of the buyer that he possesses property which he does not possess.—*Id.*

Discharge.—A discharge obtained by fraud will be set aside.—*In re Augenstein*, 16 N. B. R. (Sup. Ct. Dist. of Col.) 252.

Fees.—1. The assignee of an insolvent debtor under the general assignment for the benefit of creditors is entitled to the disbursements legitimately made in the execution of his trust before the debtor was adjudged a bankrupt, but he is not entitled to services as preferred, nor to attorney's fees paid by him. As to these, proof as an ordinary creditor must be made.—*In re Lains*, 16 N. B. R. (M. D. Dist.) 168.

2. Where property coming into the hands of an assignee is subsequently found to be subject to a lien, it is to be charged with the reasonable costs of keeping and selling it, as well as the assignee's fees; but not for services of an auctioneer, without showing that such services were necessary, nor for attorney's fees for services rendered the assignee in contesting the lien claim.—*In re Peabody*, 16 N. B. R. (Col. Dist.) 243.

Fraudulent Conveyance.—Fraudulent conveyances are not void but voidable by creditors, and property embraced in them does not vest absolutely in the assignee in bankruptcy as a portion of the bankrupt's estate.—*Phelps v. Curtis*, 16 N. B. R. (Sup. Ct. Ill.) 85.

Fraudulent Preference.—1. In a suit to set aside a mortgage as fraudulent, if the defendant knew that there was a large amount of other unsecured debts which the debtor could not pay, and that a large part of the property was common to all, from which to get their pay, he knew that he was, in taking the mortgage, obtaining a fraudulent preference.—*In re Armstrong*, 16 N. B. R. (Vt. Dist.) 275.

2. Where a mortgage sought to be set aside was executed within the time named in the act to constitute a fraudulent conveyance, *held*, that the fact that the mortgagor had repeatedly failed to pay when promised, coupled with the knowledge of other debts owing by the mortgagor, constituted reasonable cause for him to believe that the insolvency which in fact existed did exist.—*Id.*

Preference.—A creditor accepting security has no right to wilfully close his eyes to facts the existence of which he could have ascertained by the slightest effort.—*Lloyd v. Strobbridge*, 16 N. B. R. (Cal. Dist.) 197.

Sale.—1. The objection that the purchaser at an assignee's sale was the attorney of the assignee, and as such incapable of purchasing, should be made in a court of bankruptcy, and cannot be made collaterally in another.—*Spilman v. Johnson*, 16 N. B. R. (Vt. Ct. App.) 145.

2. Where a claim was marked "worthless" by the bankrupt in his schedule, and it was sold by the assignee with other claims, the validity of the sale cannot be affected by the fact that the claim has turned out to be valuable in the hands of the purchaser.—*Phelps v. McDonald*, 16 N. B. R. (Sup. Ct. Dist. Col.) 217.

Subrogation.—S. and H. were partners, equally interested. Upon final settlement S. was found to owe H. a balance. As partners they guaranteed a debt to G, which they were decreed to pay and did pay out of the partnership assets. S. went into bankruptcy, when H. claimed a lien upon the individual estate of S., and to be subrogated for G. for one-half the debt. *Held*, that the debt being a partnership debt, and having been paid out of partnership assets, there was no right of substitution as against creditors of either partner. Such payment only created an item in the account between the partners.—*In re Smith*, 16 N. B. R. (E. D. Va.) 113.

Tradesman.—A bankrupt engaged in farming, and trading, buying, and selling live stock, is not a tradesman, within the meaning of Sect. 5110 of the Revised Statutes.—*In re Rugsdale*, 16 N. B. R. (Dist. Ind.) 215.

Waiver.—Acceptance by a creditor of his dividend under a composition is a waiver of any claim of set-off.—*Hunt v. Holmes*, 16 N. B. R. (Mass. Dist.) 101.

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LIABILITY OF CARRIERS.

Railway Companies that carry certain classes of passengers on free passes, usually stipulate that those using a pass shall have no claim upon the Company for injuries which they may receive on the road. In a case decided recently by the Supreme Court of the United States, *Stevens v. The Grand Trunk Railway Company*, the effect of such a stipulation was discussed. The action was brought by Stevens to recover damages for injuries received whilst a passenger in the Company's cars. The plaintiff, being the owner of a patented car-coupling, was negotiating with the Grand Trunk Company at Portland, Maine, for its adoption and use by the Company; and was requested by the latter to go to Montreal to see the Superintendent of the Car department in relation to the matter, the Company offering to pay his expenses. Stevens consented to do this; and, in pursuance of the arrangement, was furnished with a pass over the defendant's line from Portland to Montreal. On the back was the following printed endorsement:

"The person accepting this free ticket, in consideration thereof assumes all risk of all accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

During the trip from Portland to Montreal, the car in which Stevens was riding ran off the track, and was precipitated down an embankment, and the plaintiff was much injured thereby. The direct cause of the accident, it was proved, was that at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which held the ends of the rails together, so that many of the plates had fallen off on each side, leaving the rails without lateral support, and causing the track to spread. The Company relied for its defence upon the fact that the plaintiff was

travelling under the pass with the condition endorsed thereon, which, it was contended, exempted the Company from liability. As to this pass, the plaintiff testified that he put it in his pocket without looking at it, and the jury found specially that he did not read the endorsement previous to the accident, and did not know what was endorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some of which had a similar endorsement.

The Judge of first instance regarded the case as one of carriage for hire, and not as gratuitous carriage, as the Company agreed to pay the plaintiff's expenses to Montreal. The Supreme Court concurred in this view. Judge Bradley remarked: "The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transportation."

Taking this view, the Court did not find it necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger. But Judge Bradley intimated pretty strongly that this would not have altered the case. "We do not mean to imply, however," he said, "that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence, 'May not men make their own contracts, or in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one; but there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service;

the conditions on which that public service shall be performed by private enterprise are not yet entirely settled." The opinion of the Court, therefore, seemed to incline strongly to the rule that where there has been negligence on the part of the carrier, no stipulation will shield him.

FRAUDS IN BANKRUPTCY.

A recent issue of THE LEGAL NEWS contained among the notes of decisions no fewer than three cases of fraud under the Insolvent Act, disposed of by the Superior Court at Montreal in a single day. Marvellous are the variety and ingenuity of this class of frauds, and nothing but a very firm mode of dealing with them on the part of the Courts will check them. The law itself does not provide sufficient means of reaching and punishing offenders. We find a very similar state of things existing in the United States, and there, as in Canada, the result is an outcry against the law under which the frauds complained of are practised. The *Albany Law Journal* refers to a case before Judge Wallace, in which the Judge strongly animadverted upon a kind of transaction common enough in bankruptcy matters, and regretted the inability of the Court to interfere with it. A bankrupt firm, apprehending insolvency, began paying favored creditors and themselves out of the partnership assets. Then, being unable to compromise with their creditors, they made an assignment to a friend, and shortly after procured a petition in bankruptcy to be filed against them, and then took proceedings for a composition. The bankrupts all the time kept possession of the firm property under one pretext or another. The attorney who managed the proceedings for the bankrupts represented most of the creditors, and no step was taken to protect the latter. Judge Wallace remarked: "It shocks the moral sense to assist this dishonest scheme by judicial action," and he regretted "that the bankrupt law permits just such schemes as this." Our contemporary thereon observes: "We are glad to record this judicial protest against the bankrupt law, and hope it will encourage those striving in Congress to procure its repeal."

BREACH OF PROMISE SUITS.

Some years ago, in a somewhat celebrated case at Montreal, *Grange v. Benning*, in which damages were sought to be recovered for breach of promise of marriage, the counsel for the defence, Mr. Girouard, raised the point that such actions offended against public morality and should not be sanctioned by the law. We notice that in England it is proposed at the present time to abolish by legislation such actions, and the *Law Times* remarks that the movement "will recommend itself to the common sense of mankind." Although the intention of the law in allowing suits for breach of promise is good, one can hardly read the reports of the cases as they appear in the English papers, without perceiving that these actions frequently serve designing women as the means of extorting money, and that those who most readily resort to them are too often of the number who least deserve the protection which the law was intended to afford.

INJURIES RESULTING IN DEATH.

Since the remarks at page 110 were written, the Court of Appeals at Quebec has decided the case of *The Grand Trunk Railway Company & Ruel*, noted in the present issue, in which the same principle was applied.

THE PARLIAMENTS OF FRANCE.

[Continued from page 114.]

No uniform law prevailed throughout France. A man passed from one system of jurisprudence to another, as he journeyed from province to province—from Normandy to Brittany, from Provence to Dauphine. The territorial jurisdiction of the Parliament of Paris, though large, was by no means over the largest part of the kingdom. Courts, similar in constitution and power to that of Paris, were subsequently established in various parts of France, until there were thirteen separate parliaments, besides several superior courts possessing similar powers. Each parliament was supreme within its own territory. That of Paris was superior only in age, dignity, and influence; but no appeal lay to it from the co-ordinate bodies.

The systems of law administered by them varied widely. In some provinces, the *droit écrit* prevailed, and the civil law furnished the basis for judicial rules. Other provinces were *pays de coutumes*, where a customary law had grown up, and was administered by the courts. Even in the districts where the *droit écrit* prevailed, some differences in legal rules necessarily became established in the various Parliaments.

Certain edicts, political and financial, were of force throughout the kingdom; but private liabilities, a man's rights and his responsibilities, and the mode of enforcing them, might vary as he passed from one village to another. He could breakfast at Nismes without fear of the terrors of the law, only to find himself, when he reached Arles for dinner, subject to its direst penalties. The French Revolution and its influence were needed to establish a uniform law for Frenchmen of every rank and every locality.

Parliament, in its earlier days, was a body in a condition of continual growth. When it first began to fill the place of the feudal courts, the king assigned persons to sit for a session, and their powers ended with the term for which they were appointed. By 1319, we find it provided that members of the court should receive their wages for life. As late as 1467, however, we find an edict of Louis XI. forbidding the removal of Judges, except for cause; and entire freedom from arbitrary removal was probably not established earlier than that.

The ordinance of 1307 provided that the Parliament itself should choose fit men to fill vacancies as they occurred. But the power of appointment was, for the most part, exercised by the king; and this edict was forgotten or disregarded. His right of choice was at times limited to a number of persons nominated by the Parliament. But, when such places came to be sold, the king's power of appointment was exercised without restraint. That pecuniary questions are the origin of most revolutions is a familiar truth. The French Revolution is no exception, and the silent changes in the French government prior to that great upheaval were equally the results of the same fruitful cause. Pecuniary embarrassment was the chronic condition of the French kings, and no young prodigal relieves present wants by

ruinous post-obits more recklessly than did the French monarchs seek immediate relief at the cost of future burdens. The sale of offices was a source of revenue to which royalty early turned its attention, and the mine was worked to the most ruinous extent. The offices of the members of Parliament afforded a tempting bait. The places were of great dignity, and often of great profit. Under Louis XII., the sale of judicial dignities—often practised before, but never systematically—seems to have become a regular part of the budget. The disastrous reign of Francis I. brought him to the most lamentable financial straits. Among other expedients, he organised a new chamber of Parliament, and created two presidents and eighteen counsellors to administer its affairs. Two thousand scudi were paid for appointments to each of these places. Marino Cavalli tells us that in this reign the judicial offices were bought at prices ranging from three thousand to twenty thousand francs; and that, as the sale was open, there was nothing disgraceful in selling them for as large a sum as could be obtained. The places thus purchased were held for life.

Financial needs led to endeavours to impose a further tax on the income of the office. Such efforts met with the resistance from the members of the Parliament that might be expected from men who felt, with Judge Barnard, of New York, that they had paid for their places, and no further favors could be asked. A measure was found to reconcile such an impost with judicial feelings. In the reign of Henry IV., a tax was devised, which, from its originator, was called the *Paulette*. By the payment of an annual sum, the office of any member of Parliament might become hereditary; and, if not sold by him during his life-time, upon his death it passed to his heirs, to be disposed of by them with his horses and carriages, his houses and lands. One of the sons ordinarily took the place; but it was often sold. Prices naturally increased. In the reign of Louis XIV., the price of one of these offices was a moderate fortune. The office of president *a mortier* of the Parliament of Paris was sold for five hundred thousand francs; that of a counsellor brought one hundred and fifty thousand; and that of the *procureur-général* seven hundred thousand francs. This institution remained in

force until 1789. Legal traditions, and the sale of judicial offices, had before tended to make the members of Parliament a separate class, belonging exclusively to the wealthy portion of the community. The *Paulette* made them an hereditary aristocracy. The right to exercise judicial functions descended from father to son almost as regularly as a seat in the House of Lords among the English nobility. A seat in Parliament entitled the holder to the rank of nobility, inheritable to the second generation. The hereditary possession of wealth and office rendered the *noblesse de la robe* second only in rank to the more ancient aristocracy. Between the two, a distance was preserved. The sons of French magistrates, unlike the heirs of English judges who have been elevated to the peerage, were not regarded as forming part of the ancient nobility. That body, of all aristocracies, except perhaps the Spanish, the most narrow, the most selfish, and the most weak carefully guarded its imaginary sanctity from any infusion of new blood. Its purity was purchased at the expense of its power, except for purposes of political plunder, until it passed away unhonoured and unwept at the first breath of the French Revolution. The judicial aristocracy shared, however, in all the odious privileges of the nobility: in exemption from most forms of taxation; in the right of the chase; in the right to plunder their tenants; in the sole right to places of emolument; and to the rank of officers in the army. Questions as important as those of precedence sometimes caused grave trouble. The Parliament of Aix and the Court of Accounts had a long feud on account of precedence in processions and in church. The Parliament, on one occasion, being safely within and ready for its devotions, the railing of the choir of the church was closed just as the Court of Accounts was about to enter. One of the counsellors of the latter thereupon climbed the railing, and threatened the president of the Parliament with a gun. The president concealed himself behind the stalls. After service, he mounted his chair to return home; but the members of the Court of Accounts pursued him with stones, until he took to his feet, and fled through the mud, enveloped in all the majesty of his judicial robes. The two bodies finally agreed to attend church no more to-

gether; and the hot-headed counsellors of the Court of Accounts were condemned to penance, and to assist at high mass seated in inferior stalls, while one of the number knelt penitently before the altar, candle in hand, for the sins of his fellows.

The influence of the change in the mode of appointment upon the judicial force itself remains to be seen. It was by no means as injurious as might have been anticipated. That incompetent men often occupied judicial positions was to be expected. La Bruyère complains that youths hardly out of school passed from the birch to the ermine. A pamphlet of the eighteenth century, purporting to be the will of the Duchess of Polignac, gives to all the members of Parliament who have neither beard nor sense "and that is, unfortunately, the greater number, the *Corpus Juris* and the *Royal Ordinances*, upon the condition that they will not pass upon the life, honor, or fortune of their fellow citizens until they can answer questions put them on the contents of these books." But, on the other hand, a spirit of independence, of traditional pride, grew up in these bodies, which tended to make them fearless administrators of the powers intrusted to them.

So acute an observer as Montesquieu defends the *Paulette*, and says,—

"Cette vénalité est bonne dans les états monarchiques, parce qu'elle fait faire, comme métier de famille, ce qu'on ne voudrait pas entreprendre pour la vertu; elle destine chacun à son devoir, et rend les ordres de l'état plus permanents. Dans une monarchie où, quand les charges ne se vendraient pas par un règlement public, l'indulgence et l'avidité des courtisans les vendraient tout de même, le hasard donnera de meilleurs sujets que le choix du prince."

Almost as much can be said for hereditary judges as for hereditary legislators. The history of the English House of Lords shows that the latter have not always proved inferior to those who have obtained offices by the favor of kings or people.

The information gathered by the superintendents for Colbert, in 1663, contains many curious comments on the members of the various courts.

The wars of the Fronde were not long past, and the character and habits of the judges were apparently deemed worthy of special investigation. The comments are generally unfavorable.

We are informed that M. Lamoignon, of the Parliament of Paris, under the affectation of great probity and integrity, concealed a profound ambition. President de Blancmenil was melancholy, *bizarre*, had a bad temper, had some sense, but was always at cross-purposes. De Breteuil was governed by women, and especially by one La Gaillones. Le Meneust, president of the Parliament of Brittany, on the other hand, was a *débauché*, governed by his wife, and very feeble indeed. Periot Percour, of the Chamber of Inquiries, loved gambling, dancing,—all things but law. Marot was rich, having forty thousand livres of rent. Descartes was a brother "of the Descartes who writes." All the members of the *Tournelle* of Brittany were given over to pleasure and debauchery, and had neither inclination nor ability for their work. Donneville was an honest man; but his wife ruled him. Dalligre, first president of the Parliament of Bourdeaux, "would be a fair man if he could only keep awake." Pinon's strong point was, that he was an admirable judge of the opera. Jacquelot, like Dr. Martin Luther in the ballad, loved wine, women, and song.

If the reports of these superintendents are not biased, they present a lamentable view of the morals and manners of most of the magistrates in the reign of Louis XIV. The protest of some, that their reports were free from prejudice, excites a strong suspicion to the contrary, though doubtless there were plenty of the members of the Parliament who were fertile subjects for comment. The character of the judges was undoubtedly lower from the long influence of the *Paulette*; the wars of the Fronde had a further injurious effect; and it is probable that, in many of the courts remote from Paris, the intellectual force of the judiciary was at a low ebb. The wealth and places of members were assured. Except the neighboring lord, who was generally in Paris, the members of Parliament were from youth the greatest dignitaries in some provincial city. The life tended to intellectual lethargy. The judges of Paris dealt with important matters, and the intense life of the city kept them from a slow process of mental embalming; but in the provinces the minds of the judges were usually in a condition of mild and gentle decay.

When justice was administered by the selg-

neur or bishop, judicial functions were gratuitous: the gifts of grateful or of anxious suitors furnished their only compensation. As these duties came to be performed by judges who devoted their entire time to the work, it became necessary that they should have some fixed pay. In 1400, we find that the first president received one thousand livres per year. This would be equivalent to about fourteen hundred dollars of our money, and in purchasing power would be much more. The other presidents received five hundred livres; and the counsellors had but five sols for each day of service, or say about forty cents in our money. The judges received also fees from suitors, which were called by the suggestive and appropriate name of "sweetmeats." These were fixed by the president in proportion to the labor rendered. Originally of miscellaneous character, they naturally tended to become payable in money. Sometimes they were yet more precious than gold. We find, in 1597, a president, either pious or facetious, allowing to a councillor, who had examined a petition of certain religious societies, three pater-nosters to be said for him by each society.

The pay of the judges seems to have been very moderate until a rather late period, and even then it was not equal to that of the English judges.

A counsellor of the Parliament, at the close of the sixteenth century, says that the magistrates preserved an honorable poverty, and needed private wealth to maintain their dignity. The increase of their pay was demanded even in popular ballads and pamphlets. Besides the low pay, the financial necessities of the kings rendered even that uncertain, and the court was paid in a coin that was constantly debased. Down to the seventeenth century, we find frequent complaints of the non-payment of salaries; and the court frequently passed resolutions, that, if not speedily paid, it would cease its labors, and, on some occasions, it actually closed its doors *faute de paiement*.

Under Louis XIV., the pay of the first president had risen to twelve thousand livres; that of the other presidents, to six thousand livres. Two thousand and two thousand five hundred livres were paid the counsellors. The item of fees doubtless grew to large proportions with the increase of litigation. The enormous prices

paid for judicial offices must have been largely based on the expectation of substantial returns.

In the earlier days endeavors were made to fix the rewards of counsel as well as of the judges. Dire indeed, in the early days were the penalties of extortion. The Council of Rheims, in 1148, thought the matter required the warning voice of the church, and enacted that advocates who took more than the taxed allowance should be deprived of Christian burial. The pecuniary results of legal labor are rarely devoid of interest to the practitioner. An ordinance of Philip the Hardy, in 1274, regulates the *honorarium* of advocates as it is regulated at the present day,—according to the merit of the counsel, the importance of the case, and the ability of the client. The illustration is used that a lawyer who rides with one horse cannot expect as much as one who drives with two, or with three or more; which is but a familiar instance of the talent being given to him who already has many. The same ordinance required a lawyer to swear that he would defend no cause unless he believed it just. English common sense saved English lawyers from such a mischievous requirement, even in the earliest days.

The highest pay allowed in a case was thirty livres—a sum, however, which would be equivalent in purchasing power to several hundred dollars at the present day. The advocates were bidden to state the facts clearly in their arguments, and to use no bad words or names. No advocate was to dare to discuss again what his associates had dwelt upon; neither should he repeat what he had once said, which is a rule unfortunately not in force in these days. To prevent overcharges, an ordinance of 1571 required every advocate to put on his brief what amount he received for his pay; but it excited so much opposition that it had to be revoked.

The fee-bills of solicitors were taxed by the court. If a bill of costs in a case in 1351 be a fair sample of the costs imposed on the defeated party at that day, the laments of litigants over the expense of justice rested on a most solid foundation. The suit was brought by the Gaite Brothers against Johan and Matthieu Gaite and the other heirs of Jacques and Matthieu Gaite. The heirs were condemned to pay the expenses of the brothers to be taxed by the Court, with execution against each of them. The bill is

regarded by the learned editor of the *Bulletin de la Société de l'Histoire de France* as incomplete.

It comprises, however, forty-three items of varied and ominous appearance. The clerk who went to serve the process claimed four *solidi* for his expenses; two *solidi* for the seal, and five for his time. But, as he belonged apparently to the family, the charge for his time was disallowed. No less than nine times are the expenses and fees of officers and solicitors charged for attendance at hearings or trials of the case. Two advocates are also charged for each of these days, at thirty *solidi* per day. The taxing judge reduces these charges very materially, as he allows the advocates only the scanty pittance of four *solidi*, or about a dollar, for each time, until the case was brought into Parliament. For obtaining these orders, thirty and twenty *solidi* are allowed, respectively. The case does not seem to have been argued there. The party comes to Paris to attend his case, and charges his expenses for himself, valet, and two horses, while there detained, at fifteen *solidi* per day. This item is allowed, but at a much reduced figure. The expense of living was not large compared with our own day. The cost of keeping the horses is charged at three *solidi* per day for each horse; but this item is entirely disallowed. Seventy *solidi* were paid the taxing officer, which shows the exorbitant amount of court charges. These are the expenses incurred before the case was tried or argued in Parliament. The fees there for counsel and sweetmeats for judges would largely have swelled the bill.

(To be concluded in next issue.)

AGENCY—DUTIES OF PARTICULAR CLASSES OF AGENTS.

The duties of an agent may be varied and modified by contract, but it is none the less convenient to show briefly the application of the general rules which define the duties of agents in general to particular classes of agents.

An auctioneer is bound:

(a) To use reasonable skill and diligence in his business. In *Denew v. Deverell*, 3 Camp. 451, the plaintiff, an auctioneer, had neglected to insert a usual clause in particulars of sale, by reason of which omission the sale was fruitless. The plaintiff accordingly failed to recover

commission, although the particulars were shown to the defendant. "I pay an auctioneer," said Lord Ellenborough, "as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession for recompense: although from a misplaced confidence I followed his advice without remonstrance or suspicion."

(b) To sell to third parties, *i. e.*, not to purchase himself. This disability to purchase may continue after the date of the auction. Thus, the Court of Exchequer held in *Oliver v. Court*, 8 Price, 127; *Dan.* 301, that an auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself; and that if the person so employed has also been in other respects connected with the interests of the vendor, as, for instance, by having been concerned in valuing the property, and purchases the estate next day by private contract, the property not having been sold at the auction, the purchase will be set aside. In this case the purchase was set aside after the lapse of more than twelve years. In ordinary cases, however, the disqualification to purchase does not continue after the auctioneer has descended from the rostrum: *Id.*

(c) To sell only for ready money unless otherwise authorised: *Williams v. Millington*, 11 Bl., 81.

(d) To keep the deposit until completion of contract: *Edwards v. Holding*, 5 Taunt., 815; *Gray v. Gutteridge*, 1 M. & R., 614. An auctioneer is a stakeholder: *Burroughs v. Skinner*, 5 Burr., 2639.

(e) To disclose name of his principal: *Peake* 120; *Franklyn v. Lamond*, 4 C. B., 635.

(f) To sell in person, *i. e.*, not to delegate his authority: *Cockram v. Irlam*, 2 M. & S., 301; *Coles v. Trecothick*, 9 Ves., 251.

(g) To account to his employer, but not for interest: *Harrington v. Hoggart*, 1 B. & Ad., 377; unless it was his duty to make investment: 8 Ves., 72.

(h) To keep the goods entrusted to him with the same care that a prudent man would exercise: See *Coggs v. Bernard*, 3 Ld. Raym., 917.

In case of fire, robbery, or other damage, due to *caso mayor* or accident, he is not liable, provi-

ded he has been guilty of no default: See *Davis v. Garrett*, 6 Bing. 723; *Caffrey v. Darbey*, 6 Ves., 496.

(i) Lastly, with respect to his duty at sales. An auctioneer should obtain the best price, and not sell for a less price or in a different manner from that specified in his instructions; or, if no instructions are given, from that justified by usage; but if obedience to his instructions would involve a fraud on a third person, he must not obey them, since no contract can oblige a man to make himself the instrument of fraud: *Guerreiro v. Peile*, 3 B. & A., 616; and see *Bateman's Law of Auctions*, 161.

As to bill brokers or agents employed in negotiating bills of exchange.

Such an agent is bound without delay:

1. To endeavor to procure acceptance.
2. On refusal, to protest for non-acceptance when necessary.
3. To advise the remittitur of the receipt, acceptance, or protesting; and
4. To advise any third person who is concerned: *Beawes*, 431; *Faley* by *Lloyd*, 5.

As to mercantile agents:

The following is given merely as a brief summary of the duties, inasmuch as they are more fully treated elsewhere.

Where the agent's instructions are express he must obey them in substance, except where they are illegal, in which case performance itself would be wrong: *Holman v. Johnson*, *Cowp.*, 341; *Ex parte Mather*, 3 Ves., 373.

Where the instructions are general he must follow the usage and custom, provided that course would not be injurious to his principal, or in the absence of such usage, act to the best of his judgment, and *bona fide*: *Comber v. Anderson*, 1 Camp., 523; *Lambert v. Heath*, 15 M. & W., 486.

With respect to the duty to insure the goods of the principal, the rule is thus stated by Mr. Justice Buller: "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed:

"First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands, when and in what manner he pleases.

"The second class of cases is where the

merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing.

"Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, on the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction: *Smith v. Lascelles*, 2 T. R., 187."

With respect to the other duties of mercantile agents, viz., the duty to account, to keep their principal's money distinct from their own, to act in good faith, to use diligence and the like, nothing further need be said here.

The master of a ship is bound :

(a) To give all his time to his employment: *Thomson v. Havelock*, 1 Camp., 527; *Maclach*, Mer. Ship. 172.

(b) To accept no interest in conflict with his duty. Hence he may not make profits in the course of his agency: *Ib.* But if there is no agreement to the contrary he may claim "primage accustomed," when inserted in the charter party: *Best v. Saunders, M. & M.*, 208; *Scott v. Miller*, 3 Bin. N. C., 811.

The ship's husband is bound :

(a) To select tradesmen and appoint officers without partiality: *Card v. Hope*, 2 B. & C., 661; *Darby v. Baines*, 9 Ha., 372; *Abbott, Shipping*, 79.

(b) To see that the ship is properly repaired, equipped and manned: *Abbott, Ib.*

(c) To procure freights or charter-parties: *Ib.*

(d) To preserve the ship's papers: *Ib.*

(e) To make the necessary entries: *Ib.*

(f) To adjust freight and averages: *Ib.*

(g) To disburse and receive moneys, and keep and make up the accounts as between all parties interested: *Ib.*; *Sims v. Brittain*, 4 B. & Ad., 375.

(h) To act in person.

(i) To account.

If he refuses or delays to do so, he will be liable to pay interest on the money in his hands: *Pearce v. Greene*, 1 J. & W., 135, 139.

His duties are thus summarized in Bell's

"Principles of the Law of Scotland," p. 449 :

"1. To arrange everything for the outfit and repair of the ship—stores, repairs, furnishings: to enter into contracts for affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishing stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money wherewith to pay. 3. He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest without special authority. 5. He cannot give authority to a law agent that will bind his owners for expenses of a law suit. 6. He cannot delegate his authority.

As to solicitors :

A solicitor who accepts a retainer to do any business as solicitor, contracts to carry on the business to its termination, provided the client supplies him with reasonable funds: *Whitehead v. Lord*, 7 Ea., 691, viz: such funds as enable the solicitor to proceed with the cause by meeting the expenses as they arise: *Haslop v. Metcalf*, 1 Jur., 816.

His duty is :

(a) To exercise reasonable skill and diligence in his profession.

The measure of damages recoverable in consequence of a breach of duty by a solicitor, is the loss or damage to which the client has been subjected directly by reason of the solicitor's default or neglect.

In *Stannard v. Ullithorne*, 10 Bing., 491, A, the assignee of a lease, employed B as an attorney to peruse, on his behalf, the draft of an assignment. B allowed A to execute an unqualified covenant that the lease was valid (an unusual covenant) without informing him of the consequences. B was accordingly held liable for such damages as A had suffered.

It is exceedingly difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bound, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases, for which he

is undoubtedly responsible: Per Chief Justice Tindal, *Godefroy v. Dalton*, 6 Bing., 467.

Solicitors who undertake to act for a client are presumed to know the duties imposed upon them by act of Parliament and rules of court, as well as by the ordinary practice and routine of professional duty, and will be liable to their clients for want of such knowledge, but they are not liable for mistakes upon difficult points of law, unless they undertake to act upon their own opinion: *Kemp v. Burt*, 1 Nev. & M., 262; *Pitt v. Zalden*, 4 Burr., 2,080; *Hart v. Frame*, 6 Cl. & F., 193; *Stevenson v. Rowland*, 2 D. & C., 119. Except in those cases where there is a legal presumption that a solicitor has the requisite knowledge, he may free himself from responsibility by following the advice of counsel: *Godefroy v. Jay*, 7 Bing., 413; *Bracey v. Carter*, 12 Ad. & E., 373.

Solicitors have been held guilty of actionable negligence:

Where proceedings were taken in a court that had no jurisdiction, which fact was patent: *Williams v. Gibbs*, 5 Ad. & E., 208, or before the necessary preliminaries had been observed, *Hunter v. Caldwell*, 10 Q. B., 69; in suffering judgment to go by default, *Godefroy v. Jay*, sup.; in failing to deliver brief to counsel in time, *Lowry v. Guildford*, 5 C. & P., 234; in failing to be present at a trial with the witnesses, *Hawkins v. Harwood*, 4 Ex. 503, *Reece v. Rigby*, 4 B. & Ald., 203; where the client's papers have been lost, *Reeve v. Palmer*, 5 C. B., N. S., 91; or mislaid, *Wilmoth v. Elkington*, 1 N. & N., 749.

(b) To observe the utmost good faith and fidelity towards his client. Hence it is his duty to avoid the acceptance of interests conflicting with those of his client, and to advise his client with a due regard to the latter's interest:

(c) To preserve an inviolable secrecy with respect to the communications of his client, made to him whilst acting as his solicitor, whether the communications relate to an action existing or in progress at the time they are made: *Cromack v. Heathcote*, 4 Moo., 367; *Clark v. Clark*, 1 M. & Rob., 3. Provided the communications do not make the solicitor a party to a fraud, *Gartside v. Outram*, 26 L. J., 114 Ch., and it is received in the ordinary scope of his professional employment, either from a

client, or on his account, or for his benefit in the transactions of his business; or if he commits to paper, in the course of his employment on the client's behalf, matters which he knew only through his professional relation to the client, he is bound to withhold them, and will not be compelled to disclose the information or to produce the papers in any court, either as party or witness, unless the evidence required of him relates only to collateral matters: *Doe v. Andrews*, Cowp., 845; and see per Lord Brougham, *Greenough v. Gaskell*, 1 My. & K. 98.

The privilege of secrecy, on the ground of professional confidence, extends to business communications between solicitor and client, and solicitor's agent, client's agent and solicitor, and between solicitor and his agent. The practitioner's mouth is shut forever. The protection does not terminate with the death of one of the parties to it; if the solicitor becomes an interested party or ceases to practice, it may be enforced by injunction: *Hare on Discovery*, 2d ed., p. 163; as to the extent of the privilege see *Fenner v. South Coast Railway Company*, L. Rep. 7 Q. B., 770; *Simpson v. Brown*, and *Hampson v. Hampson*, 26 L. J., 612 Ch.; as to its duration see *Chomondley v. Clinton*, 10 Ves., 268.—*W. Evans in London Law Times*.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Quebec, March 8, 1878.

Present: DORION, C. J., MONK, TESSIER, and CROSS, JJ.

THE GRAND TRUNK RAILWAY COMPANY, Appellant; and RUEL et al., Respondents.

Damages—Injuries resulting in Death.

Action by relatives for death caused by carelessness of appellant. The action was brought by the parents of deceased, and by his brother and sister. The appellant demurred on the ground that no such action would lie. The demurrer was maintained as to the collateral relatives, and dismissed as to others. The defendant moved for leave to appeal on the ground that if the action were had as to one plaintiff it was bad as to all. It was certainly the rule in England.

The Court held that whether or not the rule was the same with us as it is in England, it would not apply in this particular case. The action was allowed to certain relations by a special statute; only one action could be instituted, and it was the duty of the Court, in awarding damages, by the judgment to distribute the shares coming to each person. It was, therefore, evidently immaterial whether the brother and sister were in the case or not. It could not alter the conclusions of the action.

Leave to appeal was refused.

SIMARD, Appellant, and FRASER, Respondent.

Petition to appeal—Omission to file petition within proper delay.

Motion on the part of appellant defendant in the Circuit Court, to be allowed to file his petition in appeal six months after the proper time. It appears that the appellant's attorney sent the record to another attorney in Quebec, intending he should file it for the term of September, 1877. The Quebec correspondent did not know what to do with it, and kept it in his possession over the December term, and up to the present time.

The Court held that the failure to produce the appeal was not that of the public officer, but of the appellant's attorney, and that leave could not under the circumstances be granted.

BICKELL, Appellant; and RICHARD, Respondent.

Service—Amendment of Bailiff's Return on Verbal Testimony.

The respondent having become *adjudicataire* of an immoveable property at Sheriff's sale, giving his designation as "Menuisier de la Paroisse de St. Roch de Québec," and having failed to pay the purchase money, a petition for *folle enchère* was presented against him. The Bailiff, in his return, certified that he had served the petition at Richard's domicile, at the place called Stadacona, speaking to a reasonable person of the family. An exception *à la forme* being filed by Richard, and proof made that Stadacona was a Village in the Parish of St. Roch de Québec, the Superior Court, on motion, allowed the return to be amended by adding the words "in the Parish of St. Roch de Québec," and ordered an answer to the merits, which was not produced. The

amendment was made, notice of it given, and the costs paid.

The Superior Court held that the return could not be added to by verbal testimony, and that the Petitioner could not without further proceedings avail himself of the benefit of the amendment.

Held, in appeal, overruling the judgment of the Superior Court, that the return was complete by the amendment. When the case was heard the Petitioner was entitled to the benefit of the amendment; the service and return as amended were sufficient, and the *folle enchère* was ordered.

SUPERIOR COURT.

Montreal, Jan. 18, 1878.

DORION, J.

SPROUL v. CORRIVEAU.

Practice—Motion for Security for Costs.

A motion for security for costs cannot be made after the four days from the return of the writ of summons, even although notice of such motion has been given within the four days.

Motion rejected.

Bethune & Bethune for plaintiff.

Loranger & Co. for defendant.

VOLIGNY v. CORBEILLE, and CORBEILLE, Opposant.

Requête Civile—Affidavit—Amendment.

An affidavit to a petition for *requête civile* cannot be amended, but the petition itself may be amended, no affidavit being necessary to support such petition.

Archambault & Co. for plaintiff.

Delorimier & Co. for petitioner.

Montreal, Feb. 28th, 1878.

MACKAY, J.

BOOTH v. BASTIEN et al., and BASTIEN, Opposant.

Appeal—Security to be given in order to stay Execution.

Held, the issue and service of a writ of appeal does not stay execution, unless security is given; and, therefore, an opposition founded on the issue and service of a writ of appeal, without security, was rejected on motion.

Motion granted.

Bethune & Bethune for plaintiff.

Trudel & Co. for opposants.

Montreal, March 11, 1878.

TORRANCE, J.

BOURSOIN et al., v. THE MONTREAL, OTTAWA & OCCIDENTAL RAILWAY; and Hon. A. R. ANGERS, *Pro Regina*, intervening.

Inscription for Enquête and Hearing—Conflict of Options—C. C. P. 243.

Held, that a party inscribing for *enquête* and hearing at the same time will be sustained in his option under C. C. P. 243, although the other side has on the same day inscribed for *enquête* in the ordinary way.

J. Doutré, Q. C., for plaintiffs.

E. L. de Bellefeuille for defendants.

CIRCUIT COURT.

Montreal, March 4, 1878.

MACKAY, J.

PATENAUD v. GUERTIN, and GUERTIN, Opponent.

Execution—Reduction of amount.

If execution issues for more than the amount due under a judgment, the defendant is entitled by opposition to ask that the execution be reduced to the sum really due, and he is not obliged to tender with his opposition such balance nor to deposit it in Court. The costs of such opposition must be borne by the plaintiff. (*Vide Fournier v. Russell*, 10 L. C. R. 367.)

Mousseau & Co. for plaintiff.

J. G. D'Amour for opponent.

COMMUNICATIONS.

QUEBEC JURISPRUDENCE.

To the Editor of THE LEGAL NEWS:

Sir,—A week or two ago I ventured a few remarks under the above somewhat comprehensive heading, and, having an hour to spare, would like, with your permission, to extend them a little further.

I ventured then to assert that there was a greater degree of uncertainty about the decisions of our courts in this Province than there was any valid reason for—greater than is to be found in the courts of many other countries, and much greater than is conducive either to the interests of justice or the standing of the profession in the Province.

And when I make this assertion, I do so I

think with a pretty clear consciousness of the difficulties which surround the question. I do so at least with a perfect consciousness that law, in common with all other purely metaphysical sciences, can never attain to that degree of certainty which will entitle it to rank as an "exact science;" that the multitude of questions which it involves must always be subject to a certain amount of "change;" that principles which are regarded as "settled" by one generation may be reversed by the next, as we find to be the case in other sciences, both physical and metaphysical—both practical and speculative.

In pathology, for instance, plants and flowers which are now known to be decidedly antiseptic in their influence on the atmosphere, and therefore a valuable auxiliary in the treatment of disease, and are recommended and used by the faculty as such, were not long since universally banished from the sick room as detrimental to the health of the patient.

And chemistry, although elevated by the labours of *Lavoisier* and others almost to the rank of an exact science, is still subject to a certain amount of "change" in many important particulars.

But, notwithstanding this, I am forced to believe that the jurisprudence of this Province, with proper treatment, might and should be brought to a greater degree of exactness in its application than it at present possesses. It would not at least be too much, I think, to assert that though one generation, basing its conclusions on additional experience, may reasonably be led to reverse a principle of law or practice which by a former one was regarded as settled, there ought to be, in a department of science of such immensely practical everyday importance as that of the law, a sufficient degree of certainty to permit of the same question being decided in the same way at least two weeks or even two months following.

But you have a case in which a question of practice, for instance, arises, concerning which you are in doubt. You consult the code, but the code throws no light on the subject. You look at the decisions of the past, but scarcely any two of them can be found which are in harmony with each other. You confer with your brother advocate, who, it may be, possesses a larger experience, and he tells you that

some of the judges "hold" this and others "hold" that; that Judge Smith some time ago—last month or last year—decided it in such a way, while Judge Jones last week decided it in quite an opposite sense.

Lest it be thought that I am speaking of non-realities, or at least exaggerating the truth, I will give one instance (though I am convinced a dozen such cases will readily suggest themselves to any practitioner of experience), the question of venue on a promissory note, made in one district and payable in another—made we will say in the country and payable in Montreal. Now, this question alone is a question of vast practical importance to the commercial community in this city, who have notes and bills of this kind coming due every day. We will take a case of this kind.

A merchant has a note which he is unable to collect himself, and which he feels compelled, in order to secure himself, "to hand to his lawyer for collection." But in the place where the note was made he has no legal agent, knows no one to whom he can entrust it. It may be that the maker is fortunate enough to live in a place where there are no lawyers, and indeed, for many reasons the only satisfactory course may be to sue on it here.

It is payable in Montreal, and reason and common sense would suggest that there is the place where the right of action on it arises. And, besides, it was decided in such a case by Judge Smith or Judge Jones, at such a time, that it might be so proceeded on, and he brings action here accordingly.

The action is returned, the defendant appears and files an exception to the venue, the case is fixed for hearing, all the costs of a case on the merits are incurred, with the exception of those occasioned by the adduction of evidence, the question is taken *en délibéré*, and after some days, it may be some weeks, by which time the plaintiff is pretty sick of the whole thing, the judge with many learned arguments and with that comforting reservation *sauf à se pourvoir*, dismisses the action with costs.

Can any good and sufficient reason be given for this? There may be, but I must confess that in my ignorance I cannot imagine what it is. It seems to me that nothing would be easier than for the Judges, who should be and are the real law-makers as well as the law ad-

ministrators of the country, to settle questions like this after they have arisen half a dozen times we will say, and a fair opportunity been afforded of doing so. One reason why they do not appears to lie in the unscientific way a great many of the Judges of our Courts have in dealing with the various questions of law and practice which come before them for their decision, treating every question on its own individual merits, without consideration of others of a similar character, and without aiming to establish the principle which regulates the whole; just as though a naturalist were to attempt to define the nature and characteristics of an entire genus from the consideration of a single specimen. The office of the judiciary appears to me to consist as much in building up the law as in administering it; in supplying what is lacking in it, as well as in applying that which it already possesses—a part of their functions which the Bench here in a great measure appears to overlook. The Roman Prætor, as we know, announced, on his accession to office, the rules and principles which he intended to administer during the term for which he was appointed, and these being added to and adopted by his successors, came at last to form a body of law fixed and certain which is to-day a most important element in the *corpus juris*.

This system, though impracticable at the present day, I cite for the purpose of pointing out the importance that was attached to the decisions of the magistrates even at that early period, and notwithstanding the many sources of what is now known as *positive law* which then existed, and the importance, moreover, which was evidently attached by the early jurists to that element of certainty and reliability, the absence of which, I submit, is sometimes so painfully apparent in our own jurisprudence.

S.

Montreal, March 12.

SIR FITZROY KELLY, Chief Baron of the Exchequer, is seriously unwell, and has gone to Brighton to recruit his health. The Chief Baron has attained the ripe age of 82, and his retirement at an early day from the toils of office is considered probable.

The Legal News.

VOL. I. MARCH 23, 1878. No. 12.

SEIZURE OF A RAILWAY.

We noticed in a recent issue the case of *Wyatt v. Senecal*, in which the rights of railway bondholders, with respect to the removal of rolling stock from the road, were in question. In the case of *The County of Drummond v. The South Eastern Railway Company*, decided recently by Judge Dunkin, another point of railway law of considerable importance was discussed. Part of the South Eastern Railway having been seized under execution of a judgment in the ordinary course, the question came up, whether a railway, or part of a railway, held by an incorporated company could be seized, and sold at Sheriff's sale, like an ordinary property. The Court, in an elaborate judgment, a short report of which appears in the present issue, decided that such seizure was not permitted by the law, and that it was not in the interest of creditors themselves to possess the right sought to be exercised. The Legislature might do something to amend the existing law, but his Honor intimated that caution was necessary. We quote in this connection the concluding remarks of the learned Judge:—"It may be objected—in effect it was so at the argument—that under the view here taken the active means of recourse of mortgage bondholders are less than they may probably have been led to fancy them, perhaps than they had some ground for thinking them, perhaps even than they ought to be. But with this a Court of law has no concern. Possibly enough, the law might have been put into better form, or yet may be. A Court can deal with it only as it is. At present anything in the nature of what was done in the Carillon and Grenville Railway matter can be done here (even though by consent of parties) only subject to revision, as each case presents itself, by the legislative power. It may well be a far less evil to leave things even in that state than to subject railways, to such end, to any judicial process not thoroughly hedged round with all needed safeguards, and this not merely with a view to protection of the various overt interests more immediately involved, but also to the requisite continuance (after sale, as before)

of a corporate body duly organized to hold, and bound to work, each as a public institution. And whenever attempt so to legislate shall here be made, it is obvious to remark, that the fact of our railway system falling partly under Dominion and partly under Provincial control, is one suggestive of only so much the more of caution in this behalf."

INDICTMENTS FOR LIBEL.

The prosecution in the Bradlaugh-Besant case in England, for publishing an obscene book, has failed before the Court of Appeal on a technical difficulty. The defendants were tried before the Court of Queen's Bench on indictment for unlawfully publishing an obscene book called "*Fruits of Philosophy*." Among the objections taken by the defendants at the trial was one that the indictment was defective, because it did not set forth the book or any passage thereof. The motion to quash the indictment on this ground was, however, overruled by the Court, reference being made to a case decided in the United States, *Commonwealth v. Holmes*, 17 Mass. 336, in which Parker, C. J., said:—"It can never be required that an obscene book should be displayed upon the records of a Court, for this would be to require that the public itself should give permanency to indecency." The reasons given by the Court of Queen's Bench for overruling the motion to quash were that setting out the whole book would be inconvenient, that it would be more reasonable that the objection should be taken by demurrer before the trial, and that the publication was a public nuisance. The Court of Appeal considered, however, that it would hardly ever be necessary to set forth a whole book in the indictment, and as to the objection against putting obscenity on the record, the Court very properly pointed out that the same reasoning would apply to other cases. It seems perfectly clear that indictments must be framed with sufficient precision to enable the accused to see what is charged against him, even though in so doing it may be necessary to employ language which offends the ear.

PUBLICATION OF LIBEL.

Mr. Justice McCord has given a decision at Quebec in the case of *Irvine v. Duvernay et al.*,

reported on another page, which threatens to augment the difficulties, already somewhat formidable, that surround newspaper publishers. The Judge holds in effect that the publisher of a newspaper may, in an action for libel, be summoned in any district where a copy of the paper containing the alleged libel circulates. Thus, publishers in Montreal may be called to defend themselves in Gaspé, provided a copy is proved to have been sold in that district, or to have been received by a subscriber therein. So, we presume, the publisher of a journal, the office of publication of which is in Ontario, Manitoba or British Columbia, may be sued in any district of the Province of Quebec to which a copy of the journal may happen to find its way.

THE PARLIAMENTS OF FRANCE.

(Concluded from page 126.)

The number of judges necessary to pronounce a sentence varied in the different courts. In criminal cases, a majority of two was required to convict; in civil suits, a majority of one or two was required. The vote of every member of Parliament was of equal weight. The counsellors, as their name implies, had been originally advisers of the court, when it was composed of barons or officers of State not versed in legal lore. By the gradual process often seen, the adviser had acquired the nominal as well as the actual authority. The Parliament of Saint Louis seems to have consisted of twenty-four members,—three great barons, three bishops, and eighteen knights,—with whom were associated thirty-seven clerks, lay or religious, to draw up their decrees. The peers of France preferred fighting for the Holy Land to hearing long-speaking claimants and hair-splitting advocates. It was not pleasant for a great baron, longing for a deer-hunt or an opportunity to break spears in a tournament, to listen to some wearisome trial, only finally to make himself the bewildered mouthpiece of some black-gowned student of Bologna, who did not know the first rules of the noble science of venery, who was ignorant alike of the joyous art of the troubadour and of the weight of a coat of mail. The baron went slaying the Saracen, and the clerks became actual members of the great court of Parliament. The office of president was superior to that of counsellor in

dignity and emolument, but was of no greater weight in the decisions of the court.

Early regulations ordinarily present many of the features of paternal government. The faults and duties of judges were sharply looked to in the earlier days of Parliament. The ordinance of 1318 forbids the members of Parliament eating or drinking with parties who had suits before them. They were furthermore enjoined to attend the sessions, and not to leave their seats more than once in the morning. "It is a great disgrace," says the ordinance, "that while the court is in session, its members should be walking and frolicking about the halls of the palace." Age, weight, and gout, in our days, probably exert a more efficacious restraint in this respect than the admonitions of kings on beardless judges.

Despite strict instructions, perfect attention was not obtained. President de Harley remarked once, that, if the gentlemen of the court who talked would make no more noise than those who slept, it would be a great favor to those who listened. In 1681, the Chancellor Letellier informs some of the judges that the king has observed that they go to the palace with cravats, grey clothes, and with canes in their hands; and he directs them to assume a more dignified toilet. The *procureur général* of the Parliament of Rouen—an officer of enormous authority, and having a certain advisory power with the court—informs the judges that, although the gown does not make the monk, still judges ought not to clip their hair and wear beards. In 1347, the dauphin Charles forbid all magistrates having anything to do with commerce; and he also rates them for their idleness, and for the amount of time that they waste at their dinners. The judges of the present day may dine unproved; but, if the statement be correct that advocates in France have been forbidden to plead with mustaches, the tendencies of the French mind seem unchanged.

The sessions of the court were held at early hours. The great chamber met on Mondays, Thursdays, and Fridays, at six in the morning, and continued until ten. During Lent, they sat an hour longer, for convenience of attending the sermon. From six to seven reports were made. The argument of cases began at seven, and continued until the judges adjourned for refreshments. At half-past eight, they met again

and sat until ten. After ten, the chamber met as might be required, to hear reports, for consultation, and for other purposes. On Wednesdays and Saturdays the great chamber sat with closed doors, to consider matters of state, the enregistering of decrees, and to hear parties opposing marriages. There were afternoon sessions Tuesdays and Saturdays. At the morning sessions, the presidents, from All Saints' Day to the Annunciation of the Virgin, sat in an ermine robe and a cap. The rest of the year they were arrayed in a scarlet robe. In the afternoon meetings, all were arrayed in black gowns.

One would have supposed that the early hours, which must have made miserable the lives of our ancestors, would have been changed by the eighteenth century. Still, in the great case of the diamond necklace, in 1786, the court met at a quarter past six. One hundred and eighty-seven members of Parliament, for nine months, listened to that famous trial, which excited an interest unequalled by any case not political in its nature which Europe has seen.

The fate of that glittering ornament, valued at half a million, which was made for a king's mistress, distracted all Europe, helped the downfall of the ill-fated Marie Antoinette, and furnished the last important subject for the investigation of the great court, which for five hundred years had administered the laws and influenced the destinies of France.

We have yet to sketch the political rôle of the French courts. It was one which might well have given the Parliament of Paris a power equal to that of its great namesake of England. No other body in France had any control upon the monarchy. The States-General failed, for reasons which cannot be traced here, to become operative in the national history. The French monarchy tended to become absolute. A custom which originally was merely a form, by one of those changes which often occur in political history, seemed destined to exercise a powerful control upon the unlimited authority of the king. As far back as 803, under Karl, we find the *capitularies* read and published in a public *plaid* in Paris before the *échevins*. Obedience to them was promised, and they were signed by the *échevins*, bishops, abbés, and counts, with their own hands. The reading and adoption of these royal edicts seem to have been regarded as necessary to make them effective. The enregist-

tering of ordinances with the Parliament was the continuance of this ancient practice. The custom had a natural origin. There was no other means of publishing the royal will to the community. The fittest way to inform all of the contents of the king's edicts was to have them solemnly enrolled in the records of the court for the district. It seems to have been conceded, when the uncertain forms of government had become fixed, that a royal edict or ordinance had no force or validity until it had been registered by the local court or Parliament. Registry was required, therefore, from each of the Parliaments of France. But here, as so often in French history, the Revolutions and changes of Paris were those of the entire kingdom.

The local courts rarely did aught but follow in the footsteps of the Parliament of Paris; and the history of the struggles of the judiciary for power are to be found almost exclusively in the annals of that body.

It was an easy and a natural step from the necessity of registration, for Parliament to claim the power of deciding whether that registration should be allowed. The popes, who had the right of crowning the emperor of the holy Roman empire, soon insisted that, as the coronation was necessary before the title could be assumed, such a right involved the power of deciding whether that great dignity would be worthily bestowed. The possessor of power that must be invoked soon claims a discretion in its exercise.

There can be no doubt that the power of registration in Parliament was originally only clerical. The king made the decree; the court published it to the world, and enrolled it on its registers as a part of the law it was to administer. The enlargement of this authority was, however, a healthful change. Many an institution most valuable to freedom has sprung from the dead husk of some worthless form.

The power of registration or rejection of royal decrees possessed by a body better fitted for the office might have made France a constitutional monarchy. But the long struggles of the French judiciary with the king did not bring forth the fruits that might have been hoped for. The power of the Parliament to refuse registration of edicts, unless supported by sufficient moral and popular pressure to compel acquiescence, was strangely restricted. If the Parliament refused to register an edict,

the king could hold a *lit de justice*, so called, as some one complained, because there the law was put to sleep. The Parliament was summoned to attend the king, or more frequently he himself went to the great chamber. In the presence of the entire body, the registration of the edict was ordered. No one could oppose the royal will in the royal presence, and the edict was thereupon duly enrolled.

Parliament constantly endeavoured to free itself from the exercise of this authority, and to annul the assent compelled by the presence of the sovereign. As early as the fourteenth century, under the pretext that error or inadvertence was found in some ordinance sent from the king, the registration was delayed that it might be reconsidered; and, even beyond that, it was attempted to refuse registration entirely. This endeavour was promptly checked at first; but a permanent political body, tenacious of its power, rarely fails in extending its authority. The nature of the Parliament was the fundamental reason that finally prevented its attaining a controlling influence in the government. It was not only not a representative body in form, but it was not so in feeling. The members of the judiciary in England, and much more of the Parliament, came from the people and belonged to the people. Somers on the bench was still the man who had pleaded for the seven bishops, and sat in the convention which had declared the throne vacant. But the members of the French Parliament belonged to a caste, and were fully infused with the narrow spirit of caste. An encroachment on their rights, the creation of new members of the court who might diminish the profits or dignity of those already in office, attempts to increase the tax on their salaries, or to restrict their jurisdiction—such were the edicts that met with the most vigorous opposition from these aristocratic and hereditary jurists.

Many other ordinances of the government also incurred their opposition. But it is doubtful if a legislative body, solely composed of jurists, will ever prove satisfactory in its workings. The conservatism which renders lawyers a valuable portion of the community, does not fit them to constitute the governing class. However adapted to guard the heritage of the past, they have shown little tendency to de-

velop the promise of the future. Neither does their intellectual training prepare them for legislative work. All these qualities were intensified in a close corporation like the French Parliament, composed of a hereditary legal aristocracy. Whenever it sought to assert its independence, it would refuse to register any edict for the levying of new taxes. The power of regulating taxation is undoubtedly the basis of all popular liberty; but taxation is to be regulated, not prohibited.

When additional means were needed for the frequent wars of France and the increased national expenses, the obstinate refusal of the Parliament to register any new tax rendered it necessary for the government to exercise its authority or to cease to have any authority to exercise. Kings, as well as common men, become desperate when their financial straits are extreme. A uniform and a humiliating ceremony was gone through with at such times. First, came fierce opposition to the registration of the tax, copious Parliamentary eloquence, abundant frothy denunciation of tyranny, and proclamation of the just powers of the court. Then came a *lit de justice*, and eloquent presidents *à mortier* and vituperative counsellors registered the royal will in sullen silence. Then, when the king had departed, more eloquence, and resolves not to be coerced, followed by a resolute enforcement of the ordinance by the government.

Under Richelieu, the Parliament met with its master, and the royal authority found little opposition. But the reaction which followed his despotic rule, together with the jealousy felt of Mazarin, made this body the leader of a revolutionary, though far from a liberal, party.

The remonstrances of the court against royal edicts and its demand for Mazarin's dismissal led to open hostilities. During the continuance of the first war of the Fronde, the Parliament of Paris was a legislative body. The great nobles, who had a right to a seat in it, exercised their prerogative, and took part in its deliberations. De Retz became a member, and largely influenced its action by his wily declamation and subtle policy. The famous wits and beauties who figured in that struggle, centered their attention upon its deliberations. Mme. de Longueville, the most fascinating of French

women, used upon its members her smiles and the indescribable charm of her manner. Rochefoucauld there observed many of the phases of character which are immortalized in his maxims. De Retz, Molé, Condé, and Mme. de Longueville furnished the observer of human nature with the foundation for the apothegms which have become a part of the common wisdom of the civilized world.

The Fronde was not a war having for its end any revolution in French government which should create effective checks on the royal authority. It was fanned by a host of aristocratic seekers after place and plunder, who had anticipated a rich enjoyment of the spoil after Richelieu's death. The Parliament seized the opportunity to exercise again its long-restrained prerogatives, and fostered the popular prejudice against Mazarin. The wars of the Fronde were begun from uncertain causes, prosecuted with varying purposes, and terminated with no apparent result.

Louis XIV. treated the Parliaments in much the same manner that he did his lackeys; and the conduct of the members seemed to make the treatment appropriate. In the eighteenth century, they again came into transitory political importance. The Parliament of Paris annulled the will of Louis XIV., which needed its registration to become operative. It was in this, however, but the instrument of the Duke of Orleans,—the most profligate, though not the worst, ruler of modern times.

Under Louis XV. and XVI., the Parliament was in almost constant conflict with the government. Wearied with such controversy, in 1771 Louis XV. abolished the Parliament of Paris, and soon after the provincial courts, and sent their members to rejoin their enemies of the order of Jesus in political nothingness. But Louis XVI., among his numerous well-meant, ill-received, ill-fated endeavors to satisfy the requirements of the French people for an improved administration, breathed life again into the suspended Parliaments, and restored the former judges to office. A body such as this, firmly holding to its sanctified abuses and ancient prejudices, was little fitted to lead in such a revolution as was forming. Mirabeau and Sieyès and Robespierre and Danton did not require the assistance of presidents *à mortier*, who would sit on their gorgeous seats, and

learnedly and tediously discuss the rights of registration and the prerogatives of their order. The National Assembly soon swept them away. The abolition of the Parliaments was moved. Some one objected that they were then in vacation. "So much the better," said Mirabeau: "let them remain there for ever. They will pass unperceived from sleep to death." Accordingly, on November 3, 1789, the Parliaments were directed to remain in vacation, and temporary courts were organized. "Nous avons enterré les Parlements tout vivants," said Alexander Lameth. In September, 1790, they were finally abolished, and passed out of history. In all the subsequent changes of French government, the judges have possessed solely judicial power; and no court has had more than a very small proportion of the extended jurisdiction, the pomp and the pride of the Parliament of Paris. The old Parliamentary families have almost all passed away. The most powerful court of history has left neither political nor lineal descendants. It has left a history curious and important. The judge who does not expect to pass upon measures of government in his judicial capacity, the lawyer who does not anticipate taking part in a controversy like that of the diamond necklace before a court organized like the Parliament of Paris, may still find interest and profit in the record of its customs, its work, and its fate.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Feb. 21, 1878.

DUNKIN, J.

THE COUNTY OF DRUMMOND V. THE SOUTH EASTERN RAILWAY COMPANY; and THE S. E. R. Co., Opponents.

Seizure of Railway held by an Incorporated Company.

The County of Drummond, holding fifty \$1000 mortgage bonds of the Richelieu, Drummond & Arthabaska Counties Railway Co., since merged (under Quebec Act 36 Vict., c. 51), in the South Eastern Railway Company, had recovered judgment against the latter company for \$14,490, and under a writ *de terris* had taken in execution part of the railway.

The defendant met the seizure by an oppo-

sition *à fin* d'annuler, resting chiefly on the objections: 1. That the railway of an incorporated railway company is in the nature of a public trust inseparable from its corporate franchise, incapable of becoming an ordinary private property, and not seizable under legal process. 2. That, even if seizable at all, it must at any rate be dealt with in its entirety; whereas here, the seizure was of a part of the company's railway, and left unseized a large remainder in the districts of St. Hyacinthe and Bedford.

The plaintiff answered "that the debt, for to satisfy which the property taken in execution was seized, was a debt for which said property was specifically by law and statute of the Province made liable by first hypothec, and so declared by the judgment in this cause; and that by virtue of the premises, and of the facts of this case, and by law, plaintiffs had a right to seize and take in execution the said property as they have done."

DUNN, J., referred to the case of *Abbott v. The Montreal and Bytown Railway Company*, (1 L. C. Jurist, p. 1) as not establishing the validity of a seizure and sale by Sheriff of a railway. His Honor cited 1 Redf. 250, and held that, however acquired, the railway is a statutory whole, held for ends and under servitudes constitutive of an imperative public trust,—of a trust from which nothing short of authority by or under statute can free it, or any really material part of it. The franchise of the Company—using that term as covering the whole of that trust, the entire of what are sometimes called the various franchises of the Company—subsists in order to the railway, the railway by virtue of the franchise. The right contended for by the plaintiff was one which, if granted, would do infinitely more harm than good to railway mortgage bondholders. Imagine such goods held under peril of procedure at any moment, on default of prompt payment of all coupons, for an enforced sale, at suit of any bondholder,—not of franchise and road together, to the best possible advantage, and with all possible precaution in behalf of all interests—but of the road alone, as an immoveable that any Sheriff can sell and deed over as a thing of course, irrespectively of the franchise. Bonds, so held, of any railway ever so little liable to get into financial trouble could not, for any

legitimate purpose of investment, be worth the holding.

Opposition maintained.

E. Carter, Q. C., for opposants.

N. W. Trenholme for plaintiffs contesting.

Quebec, March 11, 1878.

McCord, J.

IRVINE v. DUVERNAY et al.

Cause of Action—Libel—Newspaper—Publication.

McCord, J. This is an action of damages for libel, brought against the proprietor of the *Minerve* newspaper.

It is met by a declinatory exception, founded on the grounds: 1st. That the defendants are not domiciled within the jurisdiction of the Court; 2nd. That they have not been personally served within that jurisdiction; and 3rd. That the cause of action did not originate in this district, but in that of the domicile of the defendants; and the publication of the libel, if any, took place at Montreal.

The first two of these grounds suffer no contestation, and the only question arises upon the third.

The facts which give rise to this question are notorious, and are admitted in the record.

The defendants mail their paper at Montreal, addressed to a great number of subscribers and to public reading rooms in Quebec.

That they published their newspaper in Montreal is certainly true; but this is no ground of declinatory exception, because it is equally true that they also published it in the city of Quebec.

They are charged with having published a libel in Quebec. This is the real cause of action. The fact of their having caused the libel to be inserted in the newspaper at Montreal, as the plaintiff himself alleges, is an additional fact, which in no manner diminishes his right of action; for that right is complete without it—the mere publication of a libel being a sufficient cause of action.

The simple question comes to this: Does a person who mails in Montreal libellous matter to a number of individuals and to public reading rooms in Quebec, who receive and read the same, publish that matter in Quebec?

I am of opinion that he does, and am borne out by decisions in England which would seem to have been adopted in the United States.

Greenleaf, on Evidence, vol. 3, No. 173, p. 148, says: "The publication must be proved to have been made *within the county* where the trial is had. If it was contained in a newspaper printed in another State, yet it will be sufficient to prove that it was circulated and read *within the county*. If it was written in one county and sent by post to a person in another, or its publication in another county be otherwise consented to, this is evidence of a publication in the latter county."

This opinion is principally founded on the English case of *Rez. v. Watson*, and is given in Greenleaf's 3rd vol., which treats specially of evidence in criminal prosecutions. But the place where a crime is committed in so far as regards the jurisdiction of the Court, and the place where the right of action arose in a civil case, are analogous matters. And Greenleaf is evidently of that opinion, for in his 2nd vol., which treats of evidence in civil matters, he also says, No. 416, p. 368: "The sending of a letter by the post is a publication in the place to which the letter is sent."

And by the foot note it will be seen that he bases himself upon the English case of *R. v. Watson*. The case of *R. v. Girdwood* is also in point.

I am aware that the decision in the case of *Tremblay v. White & al.*, rendered not long ago, in this district, is against me, but I am sorry that I have not been able to bring my own opinion to coincide with it.

The learned counsel for the defendants stated at the argument, that it was the postal authorities who published the paper in Quebec, but these postal authorities are merely part of a machinery which the defendants knowingly made use of; they were not ordinary agents who would have had an option to act or not to act, and even if they had been such agents, the defendants would still be responsible for what they themselves had done *per alium* and therefore *per se*.

Exception dismissed with costs.

R. B. St. Young for plaintiff.

Mackay & Turcotte for defendants.

Montreal, March 19, 1878.

PAPINEAU, J.

JAEGER v. SAUVÉ.

Lessor and Lessee—Ejectment, action of, may be brought by Lessee.

The defendant leased a store from one

Dubord, and some time after, she sublet the same store to the plaintiff, with the consent of the landlord, who intervened in the lease. Subsequently, the defendant having refused to give possession to the sub-tenant, the latter took an action of ejectment in his own name.

F. X. Archambault, for defendant, contended that the action in ejectment pertained to the lessor only.

The Court maintained the action.

J. Doutré, Q.C., for plaintiff.

F. X. Archambault for defendant.

Montreal, March 15, 1878.

TORRANCE, J.

THE GLOBE MUTUAL LIFE INSURANCE CO. v. THE SUN MUTUAL LIFE INSURANCE CO.

Non-resident—Power of Attorney.

The plaintiffs described themselves as "The Globe Mutual Life Assurance Company, a body corporate and politic, duly incorporated according to law, and having its head office and principal place of business in New York, in the State of New York, one of the United States of America, and having an office and doing business in the City and District of Montreal."

The defendants moved that plaintiffs, as non residents, be ordered to give security for costs; but the motion was rejected by Dorion, J. (1 Legal News, p. 53) "considering that plaintiffs have alleged in their writ and declaration that they have an office and place of business in the City and District of Montreal, in this Province, where they carry on business, and that they cannot be considered as absentees for the purposes of the said motion."

The defendants then filed a dilatory exception, praying for a stay of the proceedings until the plaintiffs should have produced a power of attorney, under C.C.P. 120, as non-residents.

TORRANCE, J., in giving judgment maintaining the exception, referred to the decision by Mr. Justice Dorion, that the plaintiffs, doing business in Montreal, and having made a deposit of \$100,000 with the Minister of Finance at Ottawa, under 31 Vict. c. 48, did not come under the rule of C.C. 29. That decision being contrary to the one rendered in *The Niagara District Mutual v. Macfarlane*, 21 L. C. Jurist 224, his Honor considered it proper to look to the reason of the rule and the exceptions to it. The rule had always existed, and among the

majority of nations. By the French law foreigners were obliged to give security for costs when they instituted an action. *L'Ancien Denizart*, Vo. *Cautio judicatum solvi*. The chief exception was where the foreigner had immoveable property in France. Pothier, *Personnes*, Tit. II, p. 577. The rule of the C. C. 29 (Quebec) required security from non-residents in Lower Canada, and that rule was taken from the Provincial Statute, 41 Geo. III, c. 7, s. 2. The reason of the rule was the same in the modern French law. 2 *Carré & Chauveau*, p. 155-172; C. C. Nap. 16; C. C. P. Nap. 166, 167; 1 *Demolombe* p. 308, n. 253; *Fisher's Digest*, Vo. *Costs*, pp. 2028-2030; *Kilkenny and Great Southern & Western Railway Co. v. Fielden*, 6 *Exchequer Cases*, 81. The foreign plaintiffs here argued that having a business agency in Montreal, and having made the usual deposit of money with the Government at Ottawa, they were not bound to give security for costs. His Honor remarked on this that the plaintiffs were non resident notwithstanding that they have an agency in Montreal, and they had nothing but personal property, if any, in Montreal. Further, as to the deposit at Ottawa, it was a security for the policy holders, and this was not an action by a policy holder, or against one, but an action for libel. And even if the deposit were a security available to all, it was not a security in the Province of Quebec. The plaintiffs were non-resident in the terms of C.C. 29, and it was therefore the duty of the Court to maintain the dilatory exception.

Exception maintained.

Greenshields for plaintiffs.

S. Bethune, Q. C., for defendants.

COURT OF REVIEW.

Montreal, Feb. 28, 1878.

TORRANCE, J., DUNKIN, J., RAINVILLE, J.

[From S. C., St. Francis.

In re *DESSAULT et al.*, insolvents, and *DESEVE*, claimant, and *PREVOST et al.*, contestants.

Trader—Marriage Contract—Registration.

The claimant, who was the wife of one of the insolvents, claimed from the estate of her husband, \$1120 under their marriage contract, dated 15th February, 1868, and registered 23rd June, 1868. The claim was contested on the ground that the husband was a trader, and that

the marriage contract was not registered until long after the day fixed by law. The Court at Sherbrooke maintained the contestation, under the Insolvent Act of 1864, sec. 12. par. 2, which requires the marriage contract of every trader to be registered, in the registration division in which he has his place of business, within thirty days from the execution thereof. The claimant's husband was styled a trader in the contract.

In review the judgment was confirmed, the Court holding that the non-registration of the marriage contract of the trader within thirty days from the execution thereof, was a bar to the wife's claim against his estate.

Judgment confirmed.

Hall, White, & Panneton for claimant.

Davidson & Cushing for contestants.

COMMUNICATIONS.

THE SUPREME COURT.

To the Editor of THE LEGAL NEWS:

SIR,—May I ask the reason why the Supreme Court is so excessively slow in rendering judgments? It cannot be pretended that the judges are overwhelmed with work—they have comparatively very little to do. What then can be the reason for their being so excessively deliberate? Surely they do not need six months to make up their minds as to the merits of the cases argued before them. They have every facility the Privy Council possesses, yet what a vast difference in the dispatch of business before the two Courts. In the one, judgment almost invariably immediately after the arguments—in the other, six months' incubation on the record. The injustice worked to the parties by such delay is very great, and is without excuse.

If this state of things is allowed to continue, farewell to the idea of diverting appeals from the Privy Council. Despite of the heavy expense, all, or very nearly all, the important cases in the Province of Quebec are taken to England. The members of the profession distrust the ability of judges who, as a rule, keep cases six months under advisement.

The Supreme Court at present is looked upon with great distrust; if the miserable system of

delay now in vogue is persisted in, a year hence it will be regarded as a total failure.

Faithfully yours,
W. H. KERR.

Montreal, March 13.

ASH-WEDNESDAY.

To the Editor of THE LEGAL NEWS:

SIR,—In the Civil Code Ash Wednesday does not appear among the definitions of "Holidays," while in the Code of Civil Procedure it is quoted as a non-judicial day.

I am aware that it is not a legal holiday, so far as Promissory Notes and Bills of Exchange are concerned,—but is it a legal holiday in the Courts of this Province?

Yours, &c.
ENQUIRER.

Montreal, March 6th, 1878.

["Enquirer" will find an answer to his question in the Quebec Statute, 31 Victoria, Chap. 7, sec. 2, 25thly, which includes Easter Monday and Ash Wednesday among the "holidays" of the Province of Quebec. Ed.]

NEW PUBLICATIONS.

CLARKE'S MAGISTRATE'S MANUAL, being annotations of the various Acts relating to the rights, powers and duties of Justices of the Peace, with a summary of the Criminal Law of Canada; by Mr. S. R. Clarke, of Osgoode Hall, Barrister-at-law; Author of The Criminal Law of Canada; The Insolvent Act of 1875 and Amending Acts, &c.: Toronto; Hart & Rawlinson. Montreal; Dawson Bros.

The author of a well-known commentary on the Insolvent Act has, in the present work, presented the magistracy of the Dominion with a manual which cannot fail to be of much service to them. Books on magisterial law pass rapidly out of date, and a fresh compilation like Mr. Clarke's must supersede at once those which have appeared in former years. A special feature of Mr. Clarke's book is the citation of all the cases decided in Canada which relate in any way to the rights, powers and duties of Justices of the Peace. The English cases in point are also given. A summary of the Criminal law of Canada, alphabetically arranged, which occupies 120 pages, is

lucidly written, and will be found interesting. Mr. Clarke is a painstaking writer, and his reputation is deservedly high. We do not think that it will suffer in any respect by the publication of this valuable manual.

CODE OF CIVIL PROCEDURE.—We understand that Mr. I. Wotherspoon, of Montreal, has in press a second edition of his valuable Commentary on the Code of Civil Procedure. The publishers are Messrs. Dawson, of Montreal.

CURRENT EVENTS.

CANADA.

THE LAW OF EVIDENCE.—A bill introduced by Mr. Kirkpatrick proposes to amend the law of evidence in certain cases of misdemeanor, by the enactment of the following clause:

"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, or of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses, and compellable to give evidence."

ENGLAND.

THE LATE THOMAS CHITTY.—The death is announced in England of Mr. Thomas Chitty, the well-known Special Pleader, at the ripe age of 76. He was the author of several well-known works, Chitty's Practice and a collection of statutes being the best known. He was the father of Mr. J. W. Chitty, Q. C., one of the leaders in the Rolls Court. Mr. Thomas Chitty had the following well-known lords and gentlemen as pupils in by-gone days: Chancellor Cairns, Lord O'Hagan, Chief Justice Whiteside, Mr. Justice Willes, Mr. Justice Quain, and Sir James Hannen.

RIGHT TO LATERAL SUPPORT.—"NEIGHBOURING LAND."—*Mayor of Birmingham v. Allen*, 37 L. T. Rep. N. S. 207.—Plaintiff and defendant were the owners of parcels of land, which were separated from each other by a narrow strip of land belonging to a third person. The owner of the intervening strip had, many years ago, worked out the coal beneath it. The working the coal under his own land by the defendant caused, or

threatened to cause, a subsidence of the plaintiff's land; and this action was brought to restrain him from such working. In considering the law applicable to the case, the Master of the Rolls, starting with the proposition that a landowner is entitled to have his land, in its natural state, supported by the land of his neighbour, said:—

"Who is his neighbour? The neighbouring owner for this purpose must be the owner of that portion of land—it may be a wider or a narrower strip of land—the existence of which in its natural state is necessary for the support of my land. That is my neighbour for that purpose; as long as that land remains in its natural state, and it supports my land, I have no right beyond it, and therefore it seems to me that that is my neighbour for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable, and of such an unsolid character, that you would want a quarter of a mile of it; but whatever it is, as long as you have got enough land on your boundary which, left untouched, will support your land, you have got your neighbour, and you have got your neighbour's land to whose support you are entitled. Beyond that, it would appear to me that you have no rights."

It appearing, however, that the intervening strip would have afforded, if left in its natural state, a sufficient support to the plaintiff's land, the court said:—

"The plaintiffs have no right as against the landowners on the other side of that intervening space, and they acquire no right, whatever the owner of the intervening land may have done. If the act of the intervening owner has been such as to take away the support to which the first landowner who complains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action; but an action against the intervening owner, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiff's land, should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I cannot believe that any such law exists, or ever will exist."

The Court of Appeals sustained the decision of the Master of the Rolls, BRETT, L. J., saying:—

"Although, therefore, this is a case of first impression,—that is to say, a case in which we have, after the Master of the Rolls, for the first time, to decide what is the proper definition of 'adjacent lands,'—I think the Master of the

Rolls has given a very happy definition of them, and one which we ought to accept."

UNITED STATES.

Mrs. Lockwood's Victory.—The bill which passed the House yesterday, by a vote of 169 yeas to 87 nays, entitled "A bill to relieve certain legal disabilities of women," was the bill recently introduced by Mr. Glover for Mrs. B. A. Lockwood, and argued by her before the House Judiciary in the early part of the session. It is a modification of the same bill which has been introduced each session for the last four years, or ever since Mrs. Lockwood was refused admission to the Court of Claims on the ground that she was a married woman. The highest vote ever reached before in the House on this question was on Butler's bill, in 1874, when the yeas stood 91.

The bill was unanimously recommended by the committee for its passage at the last Congress, and committed to Mr. Hoar, who was soon after made one of that august tribunal who settled the Presidency, and no time or opportunity was afterward found to take it up.

Mrs. Lockwood was refused admission to the United States Supreme Court last year, although she was entitled under the rule, on the ground that there was no English precedent, and was told that she must wait for a more extended public opinion or for the enactment of a special law to admit her. That lady is able to cite several notable instances of women jurists in England, duly appointed, and will do so in her forthcoming brief before the Senate Judiciary, where the bill is now pending, as introduced by Senator Sargent.

This bill does away with the disability of sex, and opens the door for any other woman who is willing to qualify herself for admission.

It would seem to the casual observer as though the ordeal were hard enough without having any more obstacles thrown in the way. —*Washington Union*, Feb. 22.

A JUDGE IN TROUBLE.—The House of Representatives of the State of Minnesota on Wednesday, by a vote of 71 to 30, decided to prefer articles of impeachment against Judge Sherman Page, one of the Circuit Judges of that State. The charges are upon his alleged misconduct in office, involving "tyrannical conduct towards citizens, litigants and others, and interfering in the administration of justice to gratify personal

malice.' It is really strange, considering the great number of Judges in this country, that there are so few cases of impeachment. America, taken all in all, may well be proud of the honesty and ability of her judiciary. When a judge does administer the affairs of his office for personal ends, he should receive no mercy at the hands of the law makers. We hope, if Judge Page is guilty of the charges alleged against him, that he may receive just punishment at the hands of the General Assembly of Minnesota; but if he is innocent, that he may be vindicated by the members, without fear or favor. There is no place in America where a man can act the tyrant more than on the Judge's bench, if he is so disposed. He may abuse a lawyer, witness, or client, and if the party abused and injured even undertakes to say a word in his own behalf, he can commit him to jail for contempt of court, beyond the reach of a *habeas corpus*, and that, too, without a jury trial.—*Chicago Legal News*.

WOMEN AS LAWYERS.—The House of Representatives, on the 21st ult., passed, by the decisive majority of 169 to 87, a bill providing that when a woman shall have been a member of the bar in the highest court of any State or Territory she shall, on application, be admitted to practice before the United States Supreme Court. The Senate will probably indorse the bill, and we may expect in the course of the coming year, to hear female counsel arguing causes before the highest tribunal in our land. The bill is, however, a partial one, in that it opens the Supreme Court to the women of those States and Territories only where no distinction is made on account of sex in admissions to the bar. The great body of female aspirants for forensic honors will be still excluded from an opportunity to place their names upon the roll of the Supreme Court. We trust this circumstance will be considered when the bill comes before the Senate. But why not leave the whole matter where it belongs—with the courts? When any considerable number of the States permit women to practice at the bar, the Federal courts will give them the same opportunity, and no objection will be raised. Because two or three States and Territories and the District of Columbia have made the experiment of admitting women to the bar is no reason why the dozen or so female lawyers who

have taken advantage of the privilege shall be given a favor which is denied to their sisters residing in other parts of the country.—*Albany Law Journal*.

THE FISHERIES AWARD.—The *American Law Review*, in concluding a notice of the Fisheries Arbitration, says: "It is no secret that the opinion of each of the counsel for the United States is, that there is more money-value in the guaranty the British receive against all duties on fish, than in all that the Americans receive from the extension of rights to fish inshore; and that the amount awarded, nearly four hundred and sixty thousand dollars a year, is nearly equal to the average annual market value of all the mackerel caught by Americans in British waters, inside and outside together, and taken at their value in barrels, cured and pickled, on the wharf in Boston or Gloucester, ready for sale."

BENJAMIN F. WADE.—Benjamin Franklin Wade died on the 2nd inst. at his residence at Jefferson, Ohio. He was born near Springfield, Mass., October 27, 1800. He received a common school education. He came to Ohio in 1826, and in 1828 was admitted to the bar of that State. In 1835 he was chosen prosecuting attorney of Ashtabula county. In 1837 he was elected to the State Senate, and was twice re-elected. In 1847 he was elected presiding judge of the third judicial district of Ohio, which office he held until chosen to the United States Senate in 1851, which place he held for several terms. His last official position was that of commissioner to investigate affairs in St. Domingo, which he held in 1871. His reputation as a lawyer was very high, but it was overshadowed by the eminent place in political life occupied by him.—*Albany Law Journal*.

SUPREME COURT OF WISCONSIN.—By a recent amendment of the Constitution of Wisconsin the number of judges of the Supreme Court of that State is to be increased from three to five. The two new judges will be elected by the popular vote in April next.

ITALY.

DEATH OF AN EMINENT ITALIAN JURIST.—Paolo Frederigo Sclopis di Solerano, an eminent Italian jurist, died on the 8th inst. at Turin. He was born in 1798, and received his diploma as doctor at law when twenty years of age. He

presided at the Geneva Court of Arbitration, and achieved great credit for his conduct on that occasion. He was considered as one of the foremost international lawyers of the age.

GENERAL NOTES.

TESTATE AND INTESTATE.—In the year 1876-77 "Probate or Inventory Duty" was paid on property left by will, estimated at £120,628,580 and on £11,118,800 on persons dying intestate. In the former the cases numbered 30,498 and in the latter 10,408. Last year in England 8,664 persons died intestate leaving property worth £9,208,175; in Scotland, 629, worth £768,730; and in Ireland, 1,115, worth £1,141,895.—*London Times*.

THE LAW'S DELAYS.—The London papers are greatly concerned over the law's delay, and are asking, is there no cure? It is claimed that the knowledge of a disease is half its cure; that more than one-half the law's delays are caused by the judges wasting their time, and their want of dispatch in disposing of business. Comparisons are being made between the judges and the time it takes them to dispose of cases. It is claimed that in one court, the judge will be engaged a whole day in hearing a motion, talking and joking with the counsel, and that if a case goes over the motion day, it is equivalent to a continuance for three months, and that when a case is heard, he often takes it under advisement for months, which sometimes operates as a perpetual injunction. It is said of another judge, that he never takes any case under advisement, but decides all cases that come before him as soon as the evidence is heard; and that on motion day he will dispose of twenty or thirty motions in an hour; that he will not listen to the discussions of counsel which do not relate to the questions in issue; that he says but very little himself, and that little to the point; and that as a consequence his docket is kept up, and what is known as the law's delay is not allowed to obstruct the course of justice in his court. The London *Courier* devotes three columns to describing these judges, and the way they dispose of their business. The first it calls Judge Slow, the last Judge Quick. Much that it says applies as well to the way justice is administered in America as in England. We have no doubt much more

judicial labor could be performed by the courts of America if our judges would more fully realize the importance and cost of their time to the people. Our courts are not the places to discuss politics or war news, but to try cases in the least possible time consistent with justice. A judge can accomplish a great deal in the course of a year, if he will do no unnecessary talking himself, and allow the bar to do none. Talking judges are always unpopular with the bar. There are no class of men that like to see despatch in business more than lawyers. If any judge who is considered slow by the lawyers, will follow the above suggestions for a month, he will be astonished at the amount of judicial labour performed within the month. Few of us realize how much time we waste. This is especially so with judges.—*Chicago Legal News*.

SERVING THE DEAD.—Some Wisconsin sheriffs seem to have but faint notions of decency and propriety. The following is a *verbatim* copy of a summons and return of the sheriff thereon in a justice's court in a suit in Sparta, Wis.:

MONROE COUNTY, } ss.
Town of Sparta. }

The State of Wisconsin to the Sheriff or any Constable of said County:

You are hereby commanded to summon A. Weigand, if he shall be found within your county, to appear before the undersigned, one of the Justices of the Peace in and for said county, at my office in said town, on the 10th day of September, A.D. 1875, at 9 o'clock in the forenoon, to answer to Isaac Tuteur, plaintiff, to his damage two hundred dollars or under. Hereof fail not at your peril.

Given under my hand, this 3rd day of September, 1875.

SAMUEL HOYT,
Justice of the Peace.

MONROE COUNTY, ss.

I, Geo. B. Robinson, Deputy Sheriff of said county, do certify that I have been to the defendant's usual place of abode, and find he is dead, and so I left a copy at his last and final abode in my county, to wit: on his grave in the town of Ridgeville, he not leaving any family or funds behind. He leaves this world without a cent, and has gone where the plaintiff can't sell him whisky. Alas! Tuteur is out, and Weigand is dead!

C. W. McMILLAN, Sheriff.
By GEO. B. ROBINSON, Deputy.

Service and copy..... \$ 25
Travel, forty miles..... 4 00

\$4 25

The Legal News.

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UNANIMITY OF JURIES.

We reproduce in the present issue an article from the London *Law Times*, on the inconveniences resulting from requiring unanimity in juries. The case of *Regina v. Truelove*, referred to by our contemporary, was one in which no determination was reached, simply because one of the jury would not accept from the Court the law applicable to the case, but preferred to act upon his own view of what it ought to be. This is an incident by no means of rare occurrence, though it seems on the present occasion to have excited more than usual attention. Possibly the result may be a modification of the existing law. We notice that a bill has been introduced in the Legislature of New York, providing that the verdict of nine jurors shall be sufficient in civil cases. It may be interesting to our contemporaries in that State to know that a similar law has long existed in Lower Canada, now the Province of Quebec. The verdict of nine jurors is received, and as soon as that number are agreed, the jury return into Court. We are not aware that this modification of the English rule has occasioned any particular inconvenience or dissatisfaction. But it must be remarked that the profession of the Province do not favor jury trials at all as a mode of getting their cases decided. Jury trials are only allowed by law in matters of a commercial nature or in actions for personal wrongs, or injuries to moveable property. Yet, although thus restricted, members of the bar are by no means eager to avail themselves of the option permitted in these classes of actions. As a rule they prefer to leave their cases to the determination of a single Judge of the Superior Court, who has both to find the facts as a jury would do, and to lay down the law applicable to the facts so found. The exceptions are actions against insurance companies, and actions for the recovery of damages resulting from personal wrongs, such as breach of promise and the like. In these classes of actions there seems to be a strong conviction that a jury is more generous than a Judge, and the plaintiff usually declares

his option to have his case tried by jury. Yet, so few are the cases which actually come to trial, that in Montreal, the commercial metropolis of Canada, the jury trials, during the last twenty years, have not amounted to half a dozen per annum, and in the country districts jury trials in civil cases are almost unknown.

Reason seems to dictate that unanimity ought not to be required in civil cases. Why compel twelve citizens to be unanimous in their appreciation of damages, when, as in this Province, three or five Judges, having to pass upon the same facts, are permitted to differ, and to state their reasons of difference at length? We are curious to know on what grounds such an anomaly could be defended. Where the jury have to award a specific sum of damages, there is much greater probability of a fair award if the verdict of nine is sufficient. For where unanimity is exacted, one obstinate and ill-disposed juror can override the votes of the other eleven, or else prevent a determination. But where nine can give a verdict, the voice of such a man, or of two or three such men, sinks into insignificance. They are rendered harmless, and the majority are generally able without much delay to arrive at a figure which meets their views, and gives as much satisfaction as can be hoped for in litigated matters.

ASSAULTS UPON JUDGES.

It appears that Dodwell, the disappointed suitor who attempted to assassinate the Master of the Rolls a few weeks ago, is a clergyman. According to the *Solicitors' Journal*, he is the ex-chaplain of a workhouse in Sussex, who was dismissed from his position by the guardians. He presented a petition of right with a view to his being reinstated, but this was summarily dismissed by Vice-Chancellor Malins, and also by the Court of Appeal. Soon afterwards he was heard of at Bow Street Police Office, where he made application for a summons against Lord Justice James and other Judges for calling him "a perjured man."

Judges, as a matter of every day duty, have to give decisions which involve perhaps the whole fortunes of suitors, or at least materially affect their prospects. It is creditable to the gentlemen discharging this responsible duty, and creditable also to human nature, that so few disappointed litigants are moved to wreak

vengeance upon those whose words have so important an influence upon their fortunes. Although police magistrates and others filling subordinate positions are from time to time menaced or actually assaulted by refractory prisoners, serious attacks upon Judges holding high judicial office are almost unheard of. One has to go back to the seventeenth century for precedents. In the year 1616, Sir John Tyndal, one of the Masters in Chancery, was killed by a shot fired at him while entering his chambers at Lincoln's Inn, the assassin being a man named Bertram, against whom Sir John had given a judgment. Bertram shortly afterwards committed suicide. This is the only instance of assassination on record. In 1631, Chief Justice Richardson, who was holding the Assizes at Salisbury, was assaulted by a convict who threw a brickbat at him. Those were days when prompt justice was meted out. The right hand of the prisoner was forthwith struck off, and affixed to a gibbet, on which he was afterwards hanged in presence of the Court. These two cases seem to be the only instances furnished by the judicial history of more than two centuries. Anonymous letters of a threatening character have probably been more common.

DOUBLE APPEAL.

In the case of *The City of Montreal & Devlin*, a singular anomaly has presented itself. Each party being dissatisfied with a judgment of the Court of Queen's Bench in appeal, the *City of Montreal* desired to appeal to the Privy Council in England, while *Devlin* wished to take the case to the Supreme Court of Canada. While the motion for an appeal to England was pending, *Devlin* obtained leave from a Judge in Chambers to appeal to the Supreme Court. Subsequently the motion for an appeal to England had to be disposed of, and the Court held that although leave to appeal to the Supreme Court had been properly and of necessity granted, yet the other party was equally entitled to obtain leave to appeal to the Privy Council. Thus there would be simultaneous appeals in the same case to two different tribunals, and perhaps contradictory decisions. We print the observations of Chief Justice Dorion, calling attention to this singular anomaly.

SHOULD UNANIMITY BE REQUIRED IN JURY TRIALS?

The case of *Reg. v. Truelove*, tried in the Queen's Bench the week before last, raises this much debated question once more to that prominent position amongst questions of legal reform which it has often before occupied. So much has been written and spoken in praise of the institution of trial by jury, that it has become a sort of habit to look upon it as it now exists as an institution almost free from imperfection, and one to meddle with any part of which would be a dangerous tampering with those liberties, the possession of which we in a great measure attribute to it. None indeed of our institutions have been described by writers in terms of such unbounded panegyric as this, from the time of the authors of our earliest law books down to that of Blackstone, who, in reverence for what he declares to be "the palladium of British liberty, the glory of the English law, and the most transcendent privilege which any subject can enjoy or wish for," stands foremost of all. The effect of all this has been to cause attempts at reforming any part of the institution to be looked upon with disfavor and suspicion, however apparent the necessity for improvement may have shown itself; and such few reforms as have been made have been of such slow growth as to have been brought about almost imperceptibly. Still, however, it has not remained in all respects unchanged from its commencement. In fact, the rule requiring unanimity is one which came into existence long after trial by jury became an established fact. According to Lambard, in a jury of twelve the verdict of eight was to prevail, and from Bracton and Fleta it would appear that the practice in their time was for the judges, when the jury could not agree, to add to their number until twelve out of the entire number could be got to concur in a verdict. In the time of Edward I., the judge exercised the option of doing this or of compelling the original twelve to agree by starving them into it. Later it would appear that the option was always exercised in one way—the latter—and so the practice of starving a jury into unanimity became established. A note to Hale's *Pleas of the Crown*, vol. 2, p. 296, states that the ancient practice

was to take the verdict of the majority. If that was so, one of the amendments most in favor in these days would simply be a returning to the ancient practice. This practice of forcing unanimity seems to have commended itself with peculiar favor to the minds of our ancestors. Whether it arose from a consciousness of their strong propensity to indulge in excess, and a fear, consequently, that if jurors had access when impanneled to food and drink, they would render themselves incapable of deciding the question put for their decision, or whether the issues to be tried in early times were so simple as a rule that any difference of opinion was to be attributed to mere obstinacy which a little hard usage might overcome, the practice did come into being, and, once recognized, retained such a hold on the favor of the people that it continued in spite of repeated attempts at reforming it in almost all its ancient harshness down to very recent times. Lord Campbell once said to a jury on discharging them: "At the assizes, according to the traditional law, a jury which could not agree were to be locked up during the assizes, and then carried in a cart to the borders of the next county, and there shot into a ditch." All this harshness has now, however, been mitigated. The statute 33 & 34 Vict. c. 77, sect. 23, gives the judges the power which, according to *Winsor v. The Queen* (L. Rep. 1 Q. B. 308), there is no satisfactory authority for saying they had previously, of allowing the jury, after they had been sworn, at any time before giving in their verdict, the use of fire when out of court, and reasonable refreshment at their own expense. Thus, the reproach with which Bentham stigmatized the rule, that it was a "system of perjury enforced by torture," has lost its sting, for it will never happen that a judge will so use the discretion given by the above statute as to cause anything which can be described as like torture, to be brought to bear on a jury for the purpose of securing unanimity. But though the old method of enforcing it has been abolished, and the only pressure that is brought to bear on a jury now-a-days is the locking of them up so that they may deliberate together, the rule itself remains unaltered, and the arguments which used formerly to be urged against its retention possess now almost the same

weight as they always had. Why should we then require unanimity on the part of juries when in no other tribunal and in no other deliberative assembly do we require it? Elsewhere the decision of the majority prevails. The questions which juries have to dispose of are of the most difficult, doubtful and complicated nature; questions about which the opinions of men differ considerably. Is it not then contrary to all reason and experience to expect that there can be any real agreement of opinion on the part of twelve men selected at random to decide upon them? Is it not in accordance with all experience and reason that many a unanimous verdict pronounced upon such questions must have been brought about by improper compromise among the jurors of their respective opinions? These are the chief arguments which are urged in support of a change in the rule, and they are unquestionably very powerful, and at first sight seem almost conclusive. They have, indeed, influenced some of our most eminent lawyers to advocate some change in the rule. The Commissioners appointed in 1830, to report on the Courts of Common Law, stated in their report that "the interests of justice seem manifestly to require some change in the law upon this subject." Lord Mansfield's experience of trial by jury, in civil cases, caused him to say, "Trial by jury in civil cases, could not subsist now without a power somewhere to grant new trials," and Lord Campbell's opinion was that the old maxim that no one should be found guilty of crime, unless the jury were unanimously of opinion that he was guilty, should still be maintained; but in civil causes that a verdict might be given either by a majority or a certain number of the jurymen. On the other side there are still stronger array of legal authorities who, while admitting that in many respects the rule does not always work without producing evil results, contend that in civil as well as criminal cases it should be retained, on the ground that the evils which would be produced by the changes proposed would be far greater than are now or can be caused by any abuse of it. The Common Law Commissioners of 1853, amongst whom were the present Lord Chief Justice, Baron Martin, Baron Bramwell, and the late Mr. Justice Willes, had the rule under their consideration,

and, in their report, while recommending that the means of coercing into unanimity then in practice should be altered, recommended that the rule itself should be retained as well in civil as in criminal trials. They rejected altogether the argument derived from the principle, that in deliberative bodies the decision of the majority must prevail, on the ground that the questions submitted to them involve matters of opinion rather than of fact. "Every divided verdict," said they, "would be urged on the courts as a ground for a new trial, and might not unreasonably be entertained as such. But perhaps the strongest argument in favor of the present system is that by requiring unanimity in the verdict, full and complete discussion is insured. Under the present system, the minority, instead of yielding too readily to the view of the majority, and purchasing ease and release from further trouble, are naturally led to resist conclusions from which they differ, and for which their sense of duty makes them unwilling to be answerable. Hence arise full discussion and deliberation, and if the one section of the jury yields to the other, it is only because the prolonged discussion has led to altered convictions. We are, therefore, of opinion that the present rule, requiring the jury to be unanimous, should be maintained." These arguments retain their force to this day, after having successfully resisted all attempts to overcome them; and, much as we regret the miscarriages of justice which now and then occur, which may, perhaps, be attributed to the rule, we shall continue to hold the view they support, until evidence is brought to prove that such miscarriages occur far more frequently than our experience and observation lead us to believe they have occurred or are ever likely to occur. Cases like *Reg. v. Truelove* will always occur, whatever rule be adopted for obtaining the decision of a jury, so long as men are to be found, whose sense of the moral obligation of the oath they take when they get into the box is unequal to the obstinacy or conceit which causes them to decide upon the facts presented to them, upon what they consider the law ought to be rather than upon what the judge tells them it is. Hence it is that such cases furnish but weak arguments against the rule of which they are an abuse, and we trust that the rebuke administered by

the learned judge to the offender in this case, will teach men of his kind a lesson they frequently require to be taught before they are brought to a proper sense of their duty and responsibility.—*London Law Times*.

AGENCY—LIENS OF PARTICULAR CLASSES OF AGENTS.

First, as to the lien of auctioneers :

An auctioneer has a special property in the goods sold by him and a lien on goods in his possession, or on the proceeds thereof, for his commission and expenses. He may retain his commission and expenses out of any deposit or sale proceeds which have been paid to him on account of his principal: *Drinkwater v. Goodwin*, Cowp. 256; *Hammond v. Barclay*, 2 East, 227; *Story Agency*, §. 27.

If by reason of a defect in the title, the auctioneer is compelled to repay the deposit, his action is against the vendor: See *Spurrier v. Elderton*, 5 Esp. 1.

Secondly, as to bankers :

Bankers have a general lien upon all notes, bills, and other securities deposited with them by their customers, for the balance due to them upon the general account: *Paley* by *Lloyd*, 131; *Story Agency*, s. 330; *Bolland v. Bygrave*, 1 Ry. & Moo. 271.

Thirdly, as to brokers :

Brokers do not, as brokers, possess a general lien. Insurance brokers are an exception to this rule, inasmuch as a custom exists to entrust them with the possession of policies of insurance effected by them: See *Phillips on Insurance*, vol. 2, p. 575; *Snook v. Davidson*, 2 Camp. 218.

As to insurance brokers in the city of London, see *Hewison v. Guthrie*, 3 Scott, 278.

In *Jones v. Peppercorne* (28 L. J. 153, Ch.) a number of bonds payable to bearer had been deposited with bankers for safe custody. The bankers fraudulently deposited them with their brokers for the purpose of raising money upon them. The brokers accordingly raised money upon them, and it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advances made on the security of these particular bonds.

Fourthly, as to factors :

Factors have a general lien for the balance of the account : *Kruger v. Wilcox*, 1 Amb. 253.

Fifthly, as to common carriers :

A common carrier has a particular or specific lien at common law which empowers him to retain goods carried by him until the price of the carriage of those particular goods has been paid : *Butler v. Woolcott*, 2 N. R. 64.

A claim to a general lien can be supported only by proof of general usage, special agreement, or mode of dealing supporting such claim : *Rushforth v. Hadfield*, 6 East, 519, s. c. 7 East, 224 ; *Wright v. Snell*, 5 B. & Ald. 350.

Sixthly, as to the master of a ship :

The master of a ship has a maritime lien both for his wages and disbursements, and his claim is to be preferred to the claim of a mortgagee : *The Mary Ann*, L. Rep. 1 A. & E. 8, 24 Vict. c. 10, s. 10.

Formerly the master had no lien upon the ship for his wages : *Smith v. Plummer*, 1 B. & Ad. 575. By the 16th section of the 7 & 8 Vict., c. 112, he first acquired the same rights of lien for the recovery of his wages as a seaman, but only in the case of a bankruptcy of the owner, but this restriction was taken off by the 191st section of the Merchant Shipping Act, 1854, which enacts that, "every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which, by this act or by any law or custom, any seaman, not being a master, has for the recovery of his wages." The seaman, however, could not recover wages in the Admiralty Court, if there was a special contract respecting the same ; and as the master's wages are almost invariably determined by special contract, his position was not greatly improved by the Merchant Shipping Act. This difficulty was put an end to by the 10th section of the Admiralty Court Act, 1861, 24 Vict., c. 1, which enacts that "The High Court of Admiralty shall have jurisdiction over any claims by a seaman of any ship, for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any lien by the master of any ship for wages earned by him on board the ship." The claim of a seaman for his wages over-rides that of a mortgagee, hence the claim of the master in respect of his wages is also

preferred to that of a mortgagee : per Dr. Lushington, *The Mary Ann*, *ubi sup.*

The master's maritime lien on the freight for his wages and disbursements, in priority to the claims of the mortgagees, is not affected by the fact of his being also part owner of the vessel : *The Feronia*, L. Rep., 2 A. & E., 65.

A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there can be no lien where there is no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither pre-suppose nor originate in possession. This, it has been said, was well understood in the civil law, by which there might be a pledge with possession, and a hypothec without possession, and by which, in either case, the right travelled with the thing into whatsoever possession it came. Having its origin in this rule of law, a maritime lien is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process. That process is explained by Mr. Justice Story (1 Sumner, 78,) to be a proceeding *in rem*. "A maritime lien," in the language of the judicial committee of the Privy Council in *Harmer v. Bell*, 7 Moo. P. C., 284, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches ; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

Maritime liens are to be distinguished from claims, the payment of which the court has power to enforce from the ship and freight. The former spring into existence the moment the circumstances give birth to them, such as damage, salvage, and wages. But it does not follow that because a claim may, by Act of Par-

liament, be enforceable against the respondent, that it is therefore created a maritime lien : *The Mary Ann*, L. Rep., 1 A. & E., 11.

Seventhly, as to solicitors. Kinds of lien :

A solicitor has two kinds of lien :

1. A retaining lien, which is a right to retain possession of another's property until a debt due to the solicitor has been satisfied.

2. A charging lien, which is a right to charge property in the possession of another.

Liens are also divided into particular and general.

A particular lien exists when the claim arises in respect of the very property retained.

A general lien exists where the debt results from a general balance of account.

The retaining lien is both particular and general; whilst the charging lien is only particular : *Stokes on Liens*, p. 1 ; *Lush Practice*, vol. 1, 323 ; *Chitty Pract.*, vol. 1, 133.

A retaining lien is defeasible; a charging lien is absolute : *Ib.*

To what the right attaches :

The retaining lien of a solicitor attaches to all deeds, papers, money, and chattels in his possession, belonging to his client, and which have come to his hands in the course of, and with reference to, his professional employment, unless there has been some agreement to the contrary, or unless the right is inconsistent with the solicitor's employment : *Chitty Pract.*, vol. 1, 133 ; *Lush*, vol. 1, 323.

Thus the right has been held to attach to :

1. Account books, ledgers, journals, and cash books : *Re Leah* ; *Ex parte Jabet*, 6 Jur. N. S., 387.

2. Letters patent : *Ex parte Solomon*, 1 Gl. & J., 25.

3. Policy of assurance : *Richards v. Platel*, C. & P., 79.

4. Papers relating to a manor, *Reg. v. Williams*, 2 H. & W., 277.

5. Articles delivered to the solicitor for the purpose of being exhibited to witnesses on the trial of an action : *Friswell v. King*, 15 Sim., 191.

6. Bills of exchange : *Gibson v. May*, 4 D. M. & G., 512.

7. An award : *Jones v. Turnbull*, 5 Dow., 592.

8. Money received by way of compromise : *Davies v. Lowndes*, 3 C. & B., 823.

"If the money," said Lord Mansfield, in

Welsh v. Hole, Doug., 238, "comes to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it."

The papers, etc., must be received by the solicitor in his professional character.

Hence there was no lien recognized in the following cases :

1. Where the deeds came to him as mortgagee : *Pelly v. Watken*, 18 L. J., 281, Ch.

2. Where the work is done in character of town clerk : *Rex v. Sankey*, 5 A. & E. 423.

3. When a deed was delivered to the solicitor for the purpose of being shown to another by way of satisfaction : *Balch v. Symes*, 1 T. & R., 87.

4. Where papers are received as steward of a manor : *Champernown v. Scott*, 6 Mad., 93.

5. Where money is invested in his name as trustee : *Re Robinson*, 5 Jur. N. S., 1024.

6. Where A gave deeds to B for the purpose of satisfying himself of their sufficiency to secure an annuity, and B gave them to C for the purpose of investigating the title, and the treaty for the annuity went off, not from any objection to the title. The court refused to allow C to retain them until the cost of investigating the title was defrayed : *Hollis v. Claridge*, 4 Taunt., 807 ; see *Ridgway v. Lee*, 25 L. J., 584 Ch.

7. Where a solicitor in a cause in chancery had, without the authority of that court, received rents : *Wickens v. Townshend*, 1 R. & My., 361.

The lien must not be inconsistent with the solicitor's employment. Hence the lien does not attach to an original will given to him to be proved : *Georges v. Georges*, 18 Ves., 294.

Or to money placed in the hands of the solicitor for a specific purpose : *Re Callen*, 27 Beau., 51.—*Wm. Evans*, in the *London Law Times*.

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, Feb. 28, 1878.

TORRANCE, J., DUNKIN, J., RAINVILLE, J.

[From S. C., Joliette.

In re MARSAN et al., Insolvents, MAGNAN, Assignee, and BROUILLET et al., Contestants.

Remuneration of Assignee—Guardianship of Estate.

The judgment appealed from maintained the

contestation by Brouillet et al., hypothecary creditors of a dividend sheet prepared by Adolphe Magnan, Assignee to the insolvents' estate.

TORRANCE, J. The facts are as follows : On Jan. 9, 1873, the assignee gave notice of a first and final dividend sheet. By this sheet the assets of the estate in question, in re Louis Marsan & al., consisted of :

1. Stock	\$20	
2. Collections of debts	37	31½
3. Price of land.....	\$575	00
4. Interest on same.....	85	
5. Interest in bank.....	\$35	50
	\$611	35
	\$668	66½

Distributed as follows :

1. Remuneration to assignee as guardian.....	\$225.00
2. Costs	148.56
3. Bill of Assignee in the li- quidation of the estate, discharge, &c.....	158.74
4. Discharge of Insolvents	49.45
	\$581.75
	\$86.91

This residue of \$86.91 was divided between the two hypothecary creditors, as follows :

1. G. Brouillet	\$48.03
2. O. Arbour	38.88
Total	\$86.91

The creditors contested this collocation, alleging that it was unjust to take out of the proceeds of the sale of land hypothecated to them, \$225, as remuneration to the assignee for the care of property which only produced \$20.

The Court below took the same view. Hence the appeal.

It appears that the assignee applied to the judge in Chambers at Joliette for taxation of this bill, after notice to the parties that he would make the application on the 14th October, 1872. Whether the application was then made does not appear, but the Judge taxed the bill at this amount on the 17th October, 1872, as appears by his certificate on the bill. It was the same Judge, familiar with the circumstances of the case, who gave the judgment now complained of. No additional parole or other evidence has been placed of record. It was the opinion of the Judge that one allowance to the assignee of \$158.74 was sufficient to compensate the assignee for his trouble and disbursements in an estate of which

the moveables under his care only produced \$20, and that he should not be allowed an additional sum of \$225, the amount in contestation. The Judge has here exercised his discretion in a matter of fact. We are not disposed to interfere with that discretion, and the judgment is therefore confirmed.

Godin & Co. for assignee.

Olivier & Baby for contestants.

SUPERIOR COURT.

Montreal, March 20, 1878.

TORRANCE, J.

SIMMS v. THE QUEBEC, MONTREAL, OTTAWA & OCCIDENTAL RAILWAY CO., and HON. A. R. ANGERS, Atty. Gen. pro Regina, opposant.

Attorney General, Change of—Official Gazette—Evidence.

Held, that the Court will take notice of change of person holding office of Attorney General, as published in the Quebec Official Gazette.

In the above case, in which the Attorney General *pro Regina* was opposant, the plaintiff moved, inasmuch as the Hon. A. R. Angers had ceased to be Attorney General, that proceedings be stayed upon the opposition until the Hon. David Ross, the present Attorney General, should have taken up the instance.

TORRANCE, J., granted the motion, holding that the Court would take notice of the publication in the *Quebec Official Gazette* of the fact that the Hon. A. R. Angers had ceased to be Attorney General.

Motion granted.

F. Keller for plaintiff.

De Bellefeuille for opposant.

COURT OF QUEEN'S BENCH.

Montreal, March 23, 1878.

Present :—DORION, C.J., MONK, RAMSAY, TESSIER, CROSS, JJ.

THE CITY OF MONTREAL, Appellant, and DEVLIN, Respondent; and *E Contra*.

Concurrent Appeal to Supreme Court and Privy Council.

Leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada.

DORION, C. J., in rendering the judgment of the Court, made the following observations :

Upon an action instituted by Mr. Devlin, the Superior Court has condemned the City of Montreal to pay to the plaintiff a sum of \$11,000. Both parties being dissatisfied with this judgment, each of them brought a separate appeal. This Court on the 13th instant reduced the amount of the judgment rendered by the Superior Court, and dismissed the appeal of Mr. Devlin, who was condemned to the costs of both appeals.

On the same day, the City obtained a rule for leave to appeal to the Privy Council. This rule was returned on the 16th instant. In the meantime Mr. Devlin presented in Chambers two petitions to be allowed to appeal to the Supreme Court from the two judgments rendered on the 13th, and the appeals were allowed.

Yesterday Mr. Devlin showed cause upon the rule obtained by the City for leave to appeal to the Privy Council, and has objected to its being granted, because an appeal having been allowed to the Supreme Court, no appeal can be taken to the Privy Council, at least pending the appeal to the Supreme Court.

The law with reference to such a case as this, is most unsatisfactory.

By section 17 of the Supreme Court Act, an appeal lies to the Supreme Court from every judgment rendered by this Court, in every case wherein the sum or value of the matter in dispute amounts to \$2000, or more. This appeal must be allowed by the Court or a judge within 30 days from the pronouncing of the judgment. The Act contains a provision that the judgment of the Supreme Court shall be final, and that no appeal shall be brought from such judgment to her Majesty in Council, except by virtue of the exercise of Her Royal Prerogative. The Act contains no such provision as regards appeals from the judgments of this Court to Her Majesty in Her Privy Council, and Article 1178 of the Civil Code, giving such right of appeal, has not been revoked, but has been considered as still in force, both by this Court and by the Privy Council, in several cases which have been taken to appeal and adjudicated upon since the establishment of the Supreme Court.

We have therefore two laws, the one granting an appeal from judgments of this Court to the Supreme Court, and the other granting an

appeal to the Privy Council, and both applicable to this case.

It is evident that the judge in Chambers, to whom the application was made to allow an appeal to the Supreme Court, had no right to deny to the party making the application, an appeal which the law gave him. The judge in such a case exercises a ministerial duty, and has no discretion to refuse an appeal in those cases where the law allows one, or to grant it in cases where it is denied.

Art. 1178 of the Civil Code is as imperative as the Supreme Court Act, and says:—"An appeal lies to Her Majesty in Her Privy Council, from final judgments rendered in appeal or error by the Court of Queen's Bench. . . . 3rdly, in all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling."

The present case, involving several thousand dollars, is one in which an appeal clearly lies to the Privy Council, and the question arises whether this Court has any authority either to deny altogether or to suspend the exercise of a right of appeal to which the parties are entitled by law.

To suspend the adjudication upon the rule for leave to appeal until the case is determined by the Supreme Court, would be equivalent to a denial of the appeal, for the judgment of the Supreme Court would be final, and were it not final it could not be in the power of this Court to grant an appeal to the Privy Council from a judgment of the Supreme Court superseding the judgment rendered by this Court.

Whatever may be the inconveniences resulting from the allowing in the same case a double appeal, one to the Supreme Court and the other to the Privy Council, and we admit they cannot be inconsiderable, yet it seems that under the present state of the law it is impossible for this Court either to refuse the application of either party, and thereby select the tribunal to which the parties shall be bound to carry their appeal, or even to suspend the application of one of them, which in reality would have the same effect. We cannot say that the City of Montreal shall be deprived of its appeal to the highest Court established for revising judgments of this Court. And, if one of the parties must be deprived of his appeal to one of the Courts, it seems it should not be the party who

made the first application and sought to appeal to the Court of last resort. We have not to reform the law, but to apply it.

On the other hand, we have no authority to say that Mr. Devlin cannot appeal to the Supreme Court merely because his adverse party wishes to appeal to the Privy Council.

Under these circumstances, the majority of the Court considers that it cannot do otherwise than to allow both appeals.

In the exercise of that extended jurisdiction which is conferred on the Supreme Court and on the Privy Council, they will, no doubt, be able to adopt such a course as may reconcile these discordant dispositions of the law by such order as may meet the justice of the case and be consistent with the rights of the parties. And if this be impossible, it will be for the Legislature, to adopt such measures as may prevent for the future the serious inconvenience resulting from the antagonistic right of appeal given to two separate tribunals, whose decisions are by law held supreme and final.

As regards this Court, it is bound by a precise text of law to grant this appeal to the Privy Council, as the Judge in chambers to whom Mr. Devlin applied, was bound to allow his appeal to the Supreme Court.

The appeal is therefore granted.

MONK and TESSIER, JJ., dissented.

R. Roy, Q. C., for the City of Montreal.

Devlin for the respondent.

CURRENT EVENTS.

GREAT BRITAIN.

RAILWAY COMPANIES AND PASSENGERS' LUGGAGE.—That railway companies carry passengers' luggage as insurers may be considered as settled by *Macrow v. Great Western Railway Company*, L. R., 6 Q. B. 612, although the question has never been expressly decided by a Court of Appeal. But in *Talley v. Great Western Railway Company*, L. R., 6 C. P. 44, it was held by the Court of Common Pleas that if luggage be placed in a railway carriage with the passenger, with his assent, and he retains control over it, the company's liability as insurer ceases, and they become liable for negligence only; and this view of the law has been affirmed by the Court of Appeal in the recent case of *Bergheim v. Great Eastern Railway Company*.

The facts were these: The plaintiff went with his wife to the Liverpool street station of the defendants' railway, intending to go to Yarmouth, and the bag which was the subject of the action was placed in a first-class carriage in which the plaintiff and his wife were to travel, with his assent. He asked a porter whether the bag would be safe while he and his wife went to luncheon, and was told that it would be. The travellers, having lunched, returned to the carriage, and just as the train was starting discovered that the bag was lost. The jury found that the porter had acted within the scope of his employment in putting the bag into the carriage, that neither the plaintiff nor the company had been guilty of negligence, and Mr. Justice Manisty directed a verdict for the company. The plaintiff appealed from this ruling, and the Court of Appeal took time to consider. Lord Justice Cotton, in delivering judgment for the company, appears to have rightly distinguished the case of a passenger retaining control of his luggage and the ordinary case of luggage being consigned to a van. But the strong point for the plaintiff appears to have been, that the porter promised him that his bag would be safe. With regard to this, however, it seems that the porter would have no authority to give such a promise, so that the judgment appears to be quite correct. The case is rather an important one, not so much from the difficulty of the question of law involved, as from the frequency with which railway passengers absolve the companies from their liability as insurers. And there are few lines upon which a railway porter will not, on the slightest hint from a passenger, place luggage in a railway carriage.—*Law Times*.

UNITED STATES.

PREDATORY HOGS.—In *Usery v. Pearce*, which came up on error from Live Oak County, the Court of Appeals of Texas (White, J.) thus stated the law as to a person's right to kill his neighbor's hogs on the plea of their destructive propensities:—

"This was a suit in the lower court by the defendants in error, against the plaintiffs in error, to recover damages for the killing of their hogs.

"In their answer, defendants admitted that they had killed two of the hogs; but pleaded justification upon the grounds that the hogs 'were

an intolerable nuisance, both to defendants and the public.' This latter plea the court struck out, which action is assigned as error.

"In *Morse v. Nizon*, where, in a case somewhat similar, the judge in the lower court had charged the jury, 'that, if they believed the hog was of a predatory character, and had the character of a chicken-eating hog, then they should find for the defendant, as any man has a right to abate a public nuisance, and it mattered not whether the plaintiff knew of the habit of the hog or not,' the Supreme Court of North Carolina, Pearson, C. J., delivering the opinion, said: 'We do not concur in the opinion of his Honor as to the right of killing hogs that are in the habit of eating chickens. The position that such a hog is a public nuisance, and may be killed by any one, is not supported on principle or authority; and, if recognized, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved; for its exercise would stir up the most angry passions, and necessarily result in personal collisions. * * * It may be the killing will be justified by proving that the danger was imminent (to another chicken), making it necessary 'then and there' to kill the hog in order to save the life of the chicken, or prevent bodily harm; but we are inclined to the opinion that, even under these circumstances, it is not justifiable to kill the hog. It should be impounded or driven away, and notice given to the owner, so that he may put it up. At all events, this course is dictated by the moral duty of good neighborhood.'—*Morse v. Nizon*, 6 Jones (N.C.), Law, p. 293.

"*Champion v. Vincent* was a case similar to the one at bar. In that case, Wheeler, Justice, said: 'There was nothing to justify or palliate the act; it was just such an act as necessarily tends to violence and breaches of the peace, and neighborhood animosities, which destroy the harmony, peace, and good order of society; and was eminently a case for damages by way of punishment and prevention. In trespass, where the party wantonly violates the law, the jury should not be sparing in damages.' Lord Abinger, 1 Meeson & Welsby, 342; 20 Tex. 811.

"The case we are considering is, in short, this: 'The appellants were endeavoring to keep and 'run a hotel,' in the town of Oakville, without having a fence or enclosure around

their house. There being nothing to prevent their free egress or ingress, the hogs of their neighbors, as was quite natural, finding the kitchen door open, would at times enter, eat, and dispose of such provisions as they found lying around loose, and sometimes break up the dishes and destroy the furniture. Defendants alleged in the plea, which was stricken out, that by these unwarranted ravages, the hogs had, first and last, during the year, damaged them in the sum of one thousand dollars. It is astonishing, if not altogether incredible, that defendants would have witnessed, and patiently suffered, all this great and serious loss, when they could, for a few dollars perhaps, have purchased the hogs, and then killed them, or could have fenced in their house with a substantial enclosure, which would have been hog-proof. If they did not wish to go to this trouble or expense, to say the least of it they might have kept the kitchen door shut and securely fastened against these destructive intruders. There was no sufficient excuse for killing the hogs; and, under all the circumstances detailed in the statement of facts, we think the verdict and judgment extremely mild."

NEW BRUNSWICK.

SIR JAMES CARTER.—Sir James Carter, formerly Chief Justice of the Supreme Court of New Brunswick, died on Sunday, March 10, aged 73.

RUFUS CHOATE.

The following letter, addressed to a biographer of the late Rufus Choate, by the Hon. Geo. W. Nesmith, formerly one of the Justices of the Supreme Court of New Hampshire, contains some interesting particulars respecting that distinguished lawyer:

FRANKLIN, JANUARY 31, 1878.

MY DEAR SIR,—I confess it would be a hopeless task for me to delineate the character of Rufus Choate. You have given, in your own finished style, a concise, yet comprehensive view of what he was and did, and you have been aided by those who saw and heard him more frequently than myself. Yet I will place my memory at your service.

I knew him while at college. Our acquaintance commenced in 1816. He was one year in advance of me in collegiate standing, and in age. I belonged to the same literary

society with him for three years, and remember with pleasure his leadership there. During my last year at college he was a tutor.

After graduation we lived a hundred miles apart. I frequently saw him when I visited Boston, had interviews with him, and occasionally heard him in courts of justice. I was with him in the Whig Presidential conventions at the nominations of Gen. Taylor, at Philadelphia, and Gen. Scott, at Baltimore. At both conventions we supported Mr. Webster as a candidate. I afterward heard his famous eulogy upon Mr. Webster. A short time before his death I had an interesting conversation with him, in which he announced the unwelcome intelligence that his physicians had notified him to quit all labor and to take a sea voyage as affording the only hope of recruiting his feeble bodily frame.

The only reminiscence of his college life which occurs to me as not already narrated by your correspondents, was an amusing practical joke perpetrated by him and some others in the exchange of potatoes for apples, in the sole remaining sack in which the latter were offered for sale by a farmer of the name of Johnson, from Norwich, and then getting Johnson to offer them for sale at the college. A purchase was made by the students, who had been notified of his approach by Choate, and then, upon opening the sack, an outcry raised against Johnson for attempted imposition. Protestations of innocence were met with ridicule, and suggestions of the interference of the Evil One. Choate, standing in front of Johnson, and amused at the perplexity depicted upon his countenance, exclaimed, "Would that Hogarth were here!" Johnson caught at the name, with suspicion, and afterward offered to reward us if we would tell where Hogarth was to be found.

One of Choate's most eloquent and effective speeches was delivered in his senior year at college, in the autumn of 1818, while acting as president of our literary society. It was upon the occasion of the introduction of many members from the Freshman class. The custom of presidents of the association had been to make a brief formal speech, setting forth the objects of the society and the duties of its members, and that was all we expected. We were surprised by a well prepared and eloquent address of considerable length. At that time he was

in vigorous health and full of energy. The silvery tones of his voice, resounding through our little Hall, kept the assembly spell-bound, while he discoursed upon those elements of character essential to the formation of the ripe scholar and the useful citizen. The late Chief Justice Perley was one of the young men then made a member of the society of "Social Friends." In after life I often heard him allude in terms of high commendation to that performance. On the following day I undertook to note down in a little scrap-book some of the thoughts to which he had given utterance, although I could not reproduce the brilliant language in which they were expressed. I give some of these memoranda:

"To make the successful scholar, patient, constant, well-directed labor is an absolute requisite. * * He must aim at reaching the highest standard of excellence of character. Good mental endowments must be allied to conscience, truthfulness, manliness. In the affairs of life brains are essential, but truth, or heart, more so. * * Not genius so much as sound principles, regulated by good discretion, command success. We often see men exercise an amount of influence out of all proportion to their intellectual capacities, because, by their steadfast honesty and probity, they command the respect of those who know them. George Herbert says, 'A handful of good life is worth a bushel of learning.' Burns' father's advice to his son was good—

'He bade me act the manly part,
Though I had ne'er a farthing,
For, without an honest, manly heart,
No man was worth regarding.'

"A critic said of Richard Brinsley Sheridan, that if he had possessed *reliableness* of character he might have ruled the world, but, for want of it, his splendid gifts were comparatively useless. Burke was a man of transcendent gifts, but the defect in his character was want of moral firmness and good temper. To succeed in life we must not only be conscientious; we must have also energy of will, a strong determination to do manly work for ourselves and others. The strong man channels his own path, and easily persuades others to walk in it. * * When Washington took command of the American army the country felt as if our forces had been doubled. So when Chatham was appointed Prime Minister in England great confidence

was created in the government. * * After General Green had been driven out of South Carolina by Cornwallis, having fought the battle of Guilford Court House, he exclaims 'I will now recover South Carolina or die in the attempt.' It was this stern mental resolve that enabled him to succeed. * * Every student should improve his opportunities to cultivate his powers. He owes this duty to his friends, his instructors, and his country. Our learned men are the hope and strength of the nation. 'They stamp the epochs of national life with their own greatness.' They give character to our laws and shape our institutions, found new industries, carve out new careers for the commerce and labor of society; they are, in fact, the salt of the earth, in life as well as in death. Constituting as they do the vital force of a nation and its very life-blood, their example becomes a continual stimulant and encouragement to every young man who has aspirations for a higher station or the higher honors of society. Now, my brethren and young friends, we beseech you to strive earnestly to excel in this honorable race for just fame and true glory, and in your efforts to mount up upon the fabled ladder, do not be found, in the spirit of envy, pulling any above you down, but rather, in the exercise of a more liberal spirit, holding out a helping hand to a worthy brother who may be struggling below you. Be assured you exalt yourself in proportion as you raise up the humbler ones."

The second part of his discourse was specially devoted to the pleasure and rewards derived from an intimate acquaintance with classical learning. His suggestions were valuable and impressive, and urged home upon our attention with great rhetorical force. If this speech had been published it would have furnished the young student with a profitable guide in his pursuit of knowledge.

Not far from the year 1845, the Hon. Levi Woodbury was invited by the literary societies of Dartmouth College to deliver an oration at the annual commencement in July. Going thither I had a seat in the stage coach with Mr. Webster, Mr. Woodbury and Mr. Choate. A good opportunity was presented of witnessing their conversational powers. Mr. Webster and Judge Woodbury had for many years resided in Portsmouth, N. H., and topics relative to men

and scenes there were much discussed by them. Of course I could not but be an interested listener. The early history of our State, the character of the settlers, their leaders, their privations and sufferings by reason of Indian warfare, the character of our early governors, and the growth of the State, with historical reminiscences and anecdotes, were introduced. I was surprised to find that Mr. Choate was so familiar with our early history as to give dates and events with accuracy. By easy transitions they passed to the judiciary of the State and the members of the bar, discussing their respective merits. On these local subjects the New Hampshire men, of course, had the vantage ground. Wishing to give a new direction, therefore, to the conversation, I asked Mr. Choate as to his later reading. He answered that he had recently been occupied in the perusal of Milton's prose and poetry. Mr. Webster said to him, "As you are so recently out of Paradise, will you tell us something about the talk that Adam and Eve had before and after the fall?" Mr. Choate asked "Do you intend that as a challenge to me?" Webster answered "Yes, I do." Choate hereupon recited promptly portions of the addresses of Adam to Eve, and Eve to Adam, much to the edification of his audience. Webster rejoined with the description of the conflict between Gabriel and Satan from the sixth book of "Paradise Lost." His recitation was received with applause. John Milton himself, had he been present, would have been satisfied with the performers on that occasion. We have seen celebrated actors on the stage but none like those in the stage.

At my last interview with Mr. Choate in Boston, after alluding to his incessant and severe labor at the bar for many years, he said he was literally worn out, and added in a melancholy way, "I have cared much more for others than for myself; I have spent my strength for naught." I reminded him that he had gained high reputation in his profession, and also as a scholar, and this was his reward. He said, "We used to read that this kind of fame was but an empty bubble; now I know it is nothing else." Such was Mr. Choate's estimate of human glory when consciously near the termination of his eventful and honored life. He added, "My light here is soon to be extinguished. I think often of the grave. I am animated by the hope of that glorious immortality to be enjoyed in a kingdom where sin and sorrow cannot come."

I remain, very respectfully, etc.,

GEO. W. NESMITH.

The Legal News.

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DISSENTIENT OPINIONS IN THE PRIVY COUNCIL.

In discussing, a few weeks ago, the question of suppressing dissentient opinions in the Supreme Court, reference was made to the Judicial Committee of the Privy Council as an appellate tribunal which never revealed the fact of a dissent, or the name of a dissentient member. That is the practice, but it is not invariable. It appears that a dissenting Judge may express his opinion if the majority of the Committee do not refuse him permission to do so. As a matter of fact, in two cases of importance of no very remote date, the dissent of members of the Committee was declared. That of the Bishop of London and of Lord Justice Knight Bruce was stated in the celebrated Gorham case, and in the case of "Essays and Reviews" the dissent of the two Archbishops was declared. In other cases of general interest the names of the dissentient Judges have been well known to the bar.

Not long ago a curious incident arose out of a dissent in the Privy Council. In the famous Ridsdale judgment—one of the cases springing from questions of vestments and postures which have agitated the ecclesiastical atmosphere in England—no dissent was declared from the bench. But it was generally known that two or three members of the Committee did not concur in the judgment, and their opinion, though bottled up at the time, exploded some six months afterwards with intensified vehemence. It happened in this way. A clergyman wrote a letter to a newspaper, in which he alleged that the Lord Chief Baron, who sat in the Ridsdale case, had authorized him to state that the judgment of the Privy Council was "an iniquitous one; that it was not a judgment founded upon law, but upon policy." This severe criticism of his colleagues led to a correspondence between the Lord Chief Baron and the Lord Chancellor, published in the *Times* of the 29th October last, in which Sir Fitzroy Kelly practically admitted that he had spoken

in terms of disparagement of his colleagues, though he repudiated the use of the term "iniquitous." It appeared that the Chief Baron desired that his dissent should be made public at the time the judgment was delivered, but his request to be allowed to state his view was refused by the majority of the Committee. The result was that his dissent was made known under circumstances which gave it much greater prominence than it would otherwise have attained.

It may be remarked that the press on that occasion did not seem to regard the system of suppression as one to be commended. The *Times*, referring to the fact that the Lord Chancellor had invoked the rule made in 1627, remarked: "We are quite sure that a defence of it for which the Lord Chancellor has to go back to 1627 is not adequate. We wonder whether there is any other country in the world except England in which, upon a question of procedure in a Court of about a quarter of a century's standing, any one would go back two hundred and fifty years. The Order of 1627, as the Lord Chief Baron says, was made when the Privy Council had very different work to do, when its occupation was very different from that of a Judicial Committee, and when it dealt in a very summary manner with ecclesiastical offences. In point of fact, all the world knew of the dissent of the Lord Chief Baron and of one or two of his colleagues immediately after the decision was delivered. It was commonly discussed in Ritualistic journals, and treated as something very mysterious, instead of being one of the most commonplace of occurrences. The Lord Chancellor must find some better authority than the rule of 1627 if he thinks it worth while to make the Judicial Committee an exception to our other Courts."

The excitement of the Lord Chief Baron was due in part to the fact that as counsel, in consultation with eight others, he had given an opinion in opposition to the judgment of the majority of the tribunal, and yet he was deprived of the opportunity of stating that his views had undergone no change. This bears out the opinion we formerly ventured to express, that the total suppression of dissents is unfair to the Judges themselves as well as objectionable in other respects.

SPECULATIVE CONTRACTS.

The U. S. District Court of Wisconsin, in *Clark v. Foss et al.*, has given a decision affecting a very numerous class of contracts entered into at the present day. The action was brought by the assignee of C. B. Stevens & Sons to set aside and cancel certain promissory notes made by the bankrupts in favor of the defendants. It was alleged that the notes were void, being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it was claimed were wagering contracts.

The bankrupts were for many years prior to the fall of 1874, when the transactions occurred, merchants and dealers in grain and produce upon the Mississippi river at De-Soto, Wis., and as such, had for several years purchased and shipped wheat and other grain to the defendants, who were commission merchants at Chicago, and members of the Board of Trade, doing business under the name of S. D. Foss & Co., and had, also, from time to time, speculated in grain in the Milwaukee market, and also in the Chicago market, through the defendants acting as their factors and commission men at that place. They were then in good financial circumstances, though with small capital; had a running account, and were in good credit and standing with S. D. Foss & Co. In October, 1874, the bankrupts ordered defendants, at different times, by telegraph, to make sales of grain for them upon the Chicago market for November delivery, amounting in the aggregate to 70,000 bushels of corn, and 5,000 or 10,000 bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago and executed them, by making, as was the custom, contracts, generally in writing, and in their own name, with different parties, for the sale of the grain for November delivery, in lots of 5,000, or multiples of 5,000 bushels, and immediately notified bankrupts by telegram and by letter, of what they had done, and their acts were fully approved by the bankrupts. No "margins" were required to be put up by C. B. Stevens & Co., as they had an account with the defendants, and were accounted by them responsible.

About the time or a little before these contracts matured, the defendant performed a part

of them on behalf of C. B. Stevens & Sons, by a purchase and actual delivery of the grain, to the parties to whom the sales were made. The evidence showed that as to 20,000 bushels of corn, there was an actual delivery of the grain, and as to 10,000 more, a delivery of warehouse receipts for that amount. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different parties and had it ready for delivery; and then finding other parties who had similar deals for November purchases and sales, formed rings, or temporary clearing houses, through which, by a system of mutual offsets and cancellations that had grown upon the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. It happened that there was a considerable rise in the market price of corn during the month of November; and it was found that after these transactions were closed, there had been a loss to C. B. Stevens & Sons, of something over \$10,000, which the defendants, having paid in cash for them on the purchase of the grain, debited to their account, according to the previous course of dealing between the parties.

The notes were soon afterwards given by the bankrupts to secure a portion of the sums so advanced by the defendants for them.

Two years afterwards, on November 19, 1876, C. B. Stevens & Sons filed their petition in bankruptcy, and were on the same day adjudged bankrupts. The assignee in bankruptcy brought this suit to set aside the notes, and in substance claimed that C. B. Stevens and Sons, at the time the orders for the sale of grain were made and executed in October, 1874, had no corn to sell, and no expectation of having any, with which to fill these contracts. That these facts were known to both parties, that is to the bankrupts, and to the defendants, and that it was understood between them at the time, that no grain was in fact to be delivered by C. B. Stevens & Sons, but the contracts were to be settled by the payment or receipt of differences, according as the market should rise or fall in the month of November, and that they were thus mere wagers upon the November market, and as such, contrary to law and void, and that the notes and mortgage confessedly given to secure

cash advances made by defendants, as the factors of the bankrupts, and with their approval, to pay the losses sustained upon these sales, should be canceled and delivered up.

The question was whether this should be done.

The Court, adopting the following principles as governing the case, sustained the validity of the notes :—

1. That the weight of authority is that you may go behind the writing and show what the real intent and meaning of the parties were, and if it appears that the writing does not express the real intent of the parties, but is merely colorable and used as a cloak to cover a gambling transaction, the Court will not lend its aid to enforce the contract, however fair it may be on its face.

2. CONTRACT FOR FUTURE DELIVERY.—That a contract for the future delivery of personal property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality; that the seller is bound by the contract to deliver the goods, and if he fails, must pay damages.

3. SPECULATIVE CONTRACTS.—That such contracts, though entered into for pure purposes of speculation, however censurable when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims upon their prudent management in business, are nevertheless not prohibited by law.

4. WHAT NECESSARY TO VITIATE.—That the substance of the contract itself must control. The secret intention of one of the parties uncommunicated to the other party, not to fulfil his contract, is not enough to make the transaction illegal; the intent that it should be a mere betting upon the market without any expectation of actual performance, must be mutual and constitute an integral part of the contract in order to vitiate it.

In the case of *Jones v. Shea*, noted in the present issue, p. 163, a point somewhat similar was raised on the part of the defendants, but in the view taken of the case by Mr. Justice Johnson it became unnecessary to determine to what extent speculative transactions will be sustained by the law.

AGENCY—LIABILITY OF PRINCIPAL—EMPLOYER AND WORKMEN.

[Wm. Evans in London Law Times.]

I. The master or employer is not liable unless on his part there is negligence in that in which he has contracted or undertaken with his workmen, either expressly or impliedly: *Wilson v. Merry*, L. Rep., 1 Sc. Ap., 332. He is liable :

1. Where he personally interferes and an accident happens through his negligence: *Roberts v. Smith*, 2 H. & N., 213. See *Ormond v. Holland*, 1 E. B. & E., 102.

2. Where he neglects to select proper and competent workmen or managers: *Wilson v. Merry*, *sup.*

3. Where he fails to supply adequate resources for the work. *Ib.*, provided the workman has not taken the employment with knowledge of the want of such adequate resources, *infra*.

4. The same remark applies where the master knowingly orders his workman or servant to use unsafe tackle: See *Williams v. Clough*, 27 L. J., 325, Ex. See *infra* for other instances of his liability.

II. When a servant enters on an employment he accepts the service with the risks incidental to it, and if he accepts an employment on machinery defective from its construction, or from the want of proper repair, and with the knowledge of the facts enters on the service, the employer is not liable to any injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. This danger cannot, however, be aggravated by any omission on the part of the employer to keep such machinery in the condition in which, from the terms of the contract, or from the nature of the employment, the workman has a right to expect that it would be kept: *Clarke v. Holmes*, 7 H. & N., 937; *Woodley v. Metropolitan Railway Company*, 36 L. T. Rep. N. S., 420; *Barton's Hill Coal Company v. Reid*, 3 Macq., 282; *Dynen v. Leach*, 26 L. J., 221, Ex., explained in *Mellors v. Shaw*, 1 B. & S., 446.

III. If the danger is concealed from the workman, and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that precautions will

be adopted by the employer to prevent or lessen the danger, and from that want of such precaution an accident happens to him before he has become aware of their absence, he may hold the employer liable: *Ib.*

So far as civil consequences are concerned, it is competent for an employer to invite persons to work for them under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned: *Ib.*

Seemle, if he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on his employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it he is in the same position as though he had accepted it with the full knowledge of its danger in the first instance.

IV. An employer does not warrant the soundness of materials or machinery used by the workmen, but he is bound to exercise reasonable care in their selection: *Wigmore v. Jay*, 5 Ex. 354.

V. In selecting a manager or workmen the employer is only bound to exercise reasonable care; he does not warrant their competency: *Potter v. Faulkner*, 31 L. J. 30, Q. B.; *Tarrant v. Webb*, 18 C. B., 796.

VI. The ordinary rule with respect to the non-liability of an employer for injuries sustained by a workman, does not apply in cases where the master, being one of several co-proprietors and engaged jointly with the servant in the work, is guilty of the negligence from which the servant suffered: *Ashworth v. Stanwix*, 30 L. J., 183 Q. B.; *Mellors v. Unwin*, 1 B. & S., 437.

The other co-owners are also liable under the circumstances mentioned: *Ashworth v. Stanwix sup.*

VII. *Seemle*, the rule respecting the non-liability of a master or employer is only one of a class and applies to every establishment, so that no member of an establishment can maintain an action against the master for an injury

done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. Thus, a friend of the servant, a son, a relative living in the same house, not in the character of servant, but as a member of the same family, cannot maintain an action any more than a servant could: See per Pollock, C. B., in *Abraham v. Reynolds*, 5 H. & N., 143.

VIII. Persons who volunteer to assist servants or workmen are in the same position as the workmen or servants, so far as concerns their right to recover from the master for any injury resulting from the negligence of such workmen or servants. They can have no greater rights against, nor impose any greater duty upon a master than would have existed had they been hired servants: *Degg v. Midland Railway Company*, 1 H. & C., 733.

When, however, a person assists in a matter in which he has common interest, and when his assistance is solicited by a person of competent authority, he has a remedy against the master of the servants through whose negligence he is injured: *Holmes v. Northeastern Railway Company*, L. Rep. 4 Ex., 254; affirmed 6 Ib., 128; *Wright v. London and Northwestern Railway Company*, L. Rep., 10 Q. B., 298.

Seemle, a person ceases to be a volunteer if his assistance was given upon request: See per Cockburn, C. J., in *Wright v. London and Northwestern Railway Company, sup.*

IX. A man is not liable to his servant for the acts of the person whom he leaves as his vice-principal in the management of the business: *Wilson v. Merry*, L. Rep. 1 Sc. Ap., 326; *Howells v. Landore Steel Company*, L. Rep. 10 Q. B., 62; nor does the fact that the employer is a corporation make any difference in the defendant's liability for the act of his manager: *Morgan v. Vale of Neath Railway Company, sup.*; *Howells v. Landore Steel Company, sup.*; nor is it material that the manager is appointed pursuant to an act of Parliament: *Howells v. Landore Steel Company, sup.*; nor that the person to whom the negligence was directly imputable, was a servant of superior authority, whose lawful directions the plaintiff was bound to obey: *Feltham v. England*, L. Rep. 2 Q. B., 33; *Gallagher v. Piper, sup.*

X. To define with precision the expression fellow-servant and fellow-workman is a matter

of no small difficulty. It may, however, be said that the authorities go to the length of the proposition that those only are to be considered as fellow-servants who are employed by the same master and engaged in a common employment: *Warburton v. Great Western Railway Company*, L. Rep. 2 Ex., 30; *Vose v. Lancashire and Yorkshire Railway Company*, 2 H. & N., 728.

But workmen employed by a contractor and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment and fellow-servants: *Murphy v. Caralli*, 8 Ad. & E., 109; *Murray v. Currie*, L. Rep. 6 C. P., 24; see per Cockburn, C. J., in *Woodley v. The Metropolitan Railway Company*, 36 L. T. Rep. N. S., 419.

The following instances were given in a Scotch case of the absence of such common employment:

1. A dairymaid in bringing milk home from the farm is carelessly driven over by the coachman.

2. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it.

3. A clerk in a shipping company's office sent on board a ship belonging to the company, with a message to the captain, meets with an injury by falling through a hatchway which the mate has carelessly left unfastened.

4. A plowman at work on land held by a railway company, and adjacent to a railway, is, while in the employment of the company, killed by an engine, which through the default of the engine driver, leaps from the line of rails into the field: *McNorton v. Caledonian Railway Company*, 28 L. T. Rep. N. S., 376.

The following have been held to be fellow-servants, the workmen injured, and the workmen through whose negligence the injury happened, being in the employ of the same master:

1. A laborer travelling by a train by which it was his duty to travel, and the guard through whose negligence the laborer was injured: *Tunney v. The Midland Railway Company*, L. Rep. 1 C. P. 291.

2. The driver and guard of a stage coach; the steerman and rowers of a boat; the men

who draw the red hot iron from the forge and those who hammer it into shape; the engine-man and the switcher; the man who lets the miners down and winds them up, and the miners: Suggested in *Barton's Hill Coal Company v. Reid*, 3 Macq. H. of L. Cas. 266.

3. A scaffolder and the general manager of the common employer: *Gallagher v. Piper*, 16 C. B. N. S., 669; 33 L. T. Rep. C. P. 329.

4. A carpenter employed for the general purposes of the company and the porters: *Morgan v. Vale of Neath Railway Company*, L. Rep. 1 Q. B., 149; affirmed 33 L. T. Rep. Q. B., 260.

5. The guard of a train and plate layers: *Waller v. The Southeastern Railway Company*, 32 L. J., 205, Ex.; 8 L. T., Rep. N. S., 325.

6. A laborer employed to do ballasting and a plate layer: *Lovegrove v. The London, Brighton and South Coast Railway Company*, 33 L. J., 329, C. P.; 16 C. B. N. S., 669.

By the application of the principle that a workman accepts an employment with the risks incidental to it, and the gradual modification of the rule that fellow servants are such as have a common master, the power of a workman or servant to obtain compensation for injuries received by him, is considerably narrowed: See (8) *supra*, and *Woodley v. The Metropolitan Railway Company (sup.)*, per Cockburn, C. J.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, March 29, 1878.

TORRANCE, J.

MACKAY v. ROUTH et al.; and THE BANK of MONTREAL et al., Garnishees.

Concurrent Garnishment.

The existence of a previous *saisie-arrest* in the hands of the defendants as garnishees does not prevent the plaintiff, (defendant in previous suit,) from seizing moneys due to defendants in the hands of other garnishees.

The plaintiff having obtained judgment against the defendants for \$4,168.09, issued an attachment after judgment in the hands of divers garnishees. The defendants contested the attachment, alleging that before it issued they had been summoned as garnishees to declare what they owed to the now plaintiff, in a suit wherein he was defendant; that

they declared they owed \$4,819, and that this writ of attachment was still pending. The defendants prayed, therefore, that the attachment in the present cause be declared null.

The plaintiffs demurred to the contestation on the ground that contestants did not allege that they had been ordered to pay the sum admitted to be due, or that they had deposited it in the hands of the Treasurer of the Province, under 36 Vict. c. 5, and 36 Vict. c. 14.

The Court maintained the plaintiff's answer-in-law and dismissed the contestation, remarking that the existence of a prior attachment at the suit of another plaintiff was no bar to the attachment in the present case.

Counsel for plaintiff cited *Duvernay and Dessaulles*, 4 L. C. R., 142.

Ivan Witherspoon for plaintiff.

L. O. Loranger for defendant.

Montreal, March 30, 1878.

JOHNSON, J.

DUHAMEL et al. v. PAYETTE.

Insolvent Act—Claim not properly inventoried.

Held, where an insolvent who was indebted to "Duhamel, Rainville & Rainville," merely put the name "Duhamel" in his list of debts, without specifying any amount, that he was not discharged from the claim by obtaining his discharge under the Act.

This was an action to recover the amount of an account due to a firm of lawyers by a client. The latter pleaded that he had obtained his discharge as an insolvent, and that the amount sued for was included in the list of his debts to the knowledge of the plaintiffs.

JOHNSON, J. The only question is whether the terms of the 61st section of the Act of 1875 have been complied with. That section discharges from all debts that "are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shown in any supplementary list furnished by the insolvent previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee." The list of creditors with the certificate of the assignee of the 27th November, 1877, contains the name "Duhamel," but without mentioning any amount. The name of the creditors was "Duhamel, Rainville & Rainville." A substan-

tial compliance with the Act will free the debtor no doubt. There is abundant authority for that; but on the other hand there is a case in the Upper Canada Law Journal, *Robson v. Warren*, cited in the note to this section in *Edgar & Chrysler's Insolvent Act of 1875*, that where the plaintiff was incorrectly named, and gave evidence that he had not been notified of the proceedings in insolvency, the debtor was held not to be discharged. That is not precisely the case here, I think, because, probably, the plaintiffs were aware of the insolvency; but there are numerous other cases reported, and the substances of all of them is that the defendant must clearly bring the case within the conditions of exemption. Now I am far from being satisfied that he has done so. There has never been any claim made by the plaintiffs or by any one of them. The register gives no amount, and no name of the real creditors. The subsequent certificate of the name 'Duhamel' with 'avocat' after it in the list of creditors, is not only at variance with the first certificate, but throws no light as to when the word 'avocat' was put there. The letter about Papineau's claim does not touch this one at all, and is not written by the insolvent, and I should have to strain the law to say that defendant can bar the plaintiffs' claim without more attention on his part to what the law held him to.

Judgment for amount demanded.

Duhamel & Co. for plaintiffs.

De Lorimier & Co. for defendant.

LEPAGE v. WYLIE.

Slander—Aggravation by Unfounded Plea.

JOHNSON, J. The plaintiff is the widow of the late Mr. John Brothers, who died on the 8th of January, 1877, and on the 4th of August ensuing she gave birth to a child. The defendant is charged with having, on two occasions in July, said that her husband was not the father of the child, and is summoned here in an action of damages for slander in so saying. He pleads that the allegations of the action are false, and adds, very unjustifiably, as it turns out, that the sole object of the action is to extort money, and that the plaintiff repeatedly tried to get a loan of money from him before she brought her action, and meeting with a refusal, threatened to sue, and

actually brought a groundless action. The proof is direct and positive by two witnesses—Sexton and Doolan. Now, this appears, I must say, to me, a very serious business. The plaintiff is proved to be a most respectable person. The defendant himself, when called as witness, admits it. It was attempted to show that the damages ought to be small, on the ground that she was not a person of susceptible feelings. The proof showed that she kept a boarding house and saloon frequented by captains of Upper Canada steamers; and she is, happily for her, a brave, outspoken woman, fitted to fight the battle of life in her bereaved position. But it would be a grievous wrong to her to infer that the evidence points to any impropriety of life of a nature to blunt her feelings. I understand the witnesses to speak in a sense exactly the reverse of this. Well, the defendant meets Sexton, and afterwards Doolan, and says this thing, I must say not only with brutal plainness, but adds: "Some say it is Creelman's; some say it is mine." Now, it struck me that though this was very coarse, it might not have been intended as malignant, and I asked that question of the witnesses, and they said there was nothing jocular about it at all; and it is simply impossible to tell this woman, under the circumstances, when she comes here for justice, that she is to submit to such an outrage—whether originated or only repeated makes no sort of difference. Therefore, she is, in the very nature of things, entitled to damages, and substantial damages, for the defendant has not contented himself with simply denying the thing, nor with admitting and apologizing for it; but he has wantonly added what he has been utterly unable to prove, viz., that her object was extortion.

Judgment for plaintiff \$200, with costs of action as instituted.

Lefebvre & Co. for plaintiff.

Doutre & Co. for defendant.

LATOUR V. CAMPBELL.

Costs—Distraction—Art. 482 C.C.P.

JOHNSON, J. Judgment was rendered in this case in April, 1875, condemning John Parker to pay \$20 damages, for which he and his co-defendant Campbell had confessed judgment; but as to Campbell himself there had been a

discontinuance filed by the plaintiff, and the judgment granted *acte* of it merely, without dismissing the action as to him, and gave the costs of contestation subsequent to the confession against the plaintiff. Campbell afterwards issued execution against the plaintiff for his costs, and was met by a judgment which the plaintiff held against him for a larger amount. Thereupon Campbell, or rather his attorneys, inscribe the case now for final judgment upon the discontinuance, and ask for *distraction* of costs in their favor. The court holds that the defendant at present inscribing and moving for *distraction* is wrong in both of those proceedings. By article 482 C.P. the attorney has not an incontestable right to *distraction* of his costs, unless he moves for it on or before the day on which judgment is given. After that if he wants it, the opposite party must have notice. Here the notice has been given, and the plaintiff produces the judgment against Campbell. This is surely a good answer to the pretension that he ought to be made to pay anything due by him to Campbell of less amount. Then as to the inscription. There is no necessity for inscribing at all. By Art. 450 the discontinuance of which *acte* was granted in the judgment was a discontinuance in the express terms of the law, that is, on payment of costs, and *acte* was given of that, and it was executory, and in fact was executed. After acquiescing in that judgment in this manner, it is clearly too late to come in and change the right of the plaintiff under his judgment against Campbell. Both the motion and the inscription are therefore dismissed with costs.

JONES V. SHEA et al.

Advances for Speculative Purposes.

JOHNSON, J. The plaintiff's action is to recover \$111.46. He was employed by the defendants to negotiate divers purchases of pork in the Chicago market through a firm there. The defendants plead that all their dealings with the plaintiff were gambling transactions on margin—no property passing—speculations not on merchandize, but on the price of merchandize; at least, that is what I gather from the plea, and the argument made in support of it; but it must be confessed that the language of the plea itself is rather singular. It says that "the only transactions which

the defendants ever had with the plaintiff in pork speculations were made in the usual gambling way," and that "the defendants furnished margins, and the pork was to be held till they were eaten up," meaning presumably the margins and not the pork. This is not an action between the parties to a gambling transaction at all. It is an action by an agent to recover advances made in a course of business proved to have been usual between the parties previously. The Chicago brokers looked to the plaintiff for their pay, and he produces and proves their receipt, and proves moreover, by a witness named Vipond, that the defendant Shea promised to pay the account. I am not going to discuss the subject of what are, or what are not gambling transactions. There is nothing precise before me, either in the pleadings or in argument, to show that, as between the so-called purchasers and vendors here, there was anything illegal, and even if there was, there is nothing whatever to reach the third party, the plaintiff, whose money was used by the defendants; and going even a step farther, and assuming that the plaintiff's advances were for gambling purposes, the parties probably may be surprised to hear that a person advancing money for the purpose of betting at cards may recover it from the one to whom he advanced it, and that transactions made illegal by our law are only transactions in our own country, and not transactions in a foreign country; but I decline to give any opinion upon these important questions. If the defendants attach importance to them, they should be properly raised and properly argued. I have other things to do besides furnishing facts in appeal to parties who come before me, not to state or to elaborate by exposition and authority what they may contend for as the law, but come as it were fishing for law, in the hope of hooking something that may serve elsewhere.

Judgment for plaintiff for amount claimed.

Robertson & Co. for plaintiff.

Curran & Co. for defendant.

—It is stated that the cost of the new Palace of Justice in Brussels, which will be a splendid building, will amount to 35,000,000f. The original estimate was 8,000,000f.

CURRENT EVENTS.

ENGLAND.

A QUESTION OF NEGLIGENCE.—A curious question of negligence arose in the case of *Firth v. Bowling Iron Co.*, decided on the 2nd ult. by the Common Pleas Division of the English High Court of Justice. The action was for the loss of a cow which had died from eating a piece of wire fencing. Plaintiff and defendants were adjoining occupiers of land, and the defendants had fenced off the land occupied by them with a fence composed of iron rope. From exposure to the weather the strands of wire rusted and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's adjoining pasture. In 1867, two heifers belonging to the plaintiff had died in consequence of taking up pieces of wire while grazing in the plaintiff's said pasture. The court held that the action was maintainable; for that the defendants, by maintaining this fence, the nature of which was known to them, were liable for the injury caused to the plaintiff, which was the natural result of the decay of the wire.

UNITED STATES.

INFRINGEMENT OF TRADE MARKS.—The New York Supreme Court, in the recent case of *Enoch Morgan Sons' Co. v. Schwachhofer*, has rendered a decision on an interesting point of the law respecting trade marks, particularly imitations of labels for the purpose of imposing on the public. The subject is one of increasing importance, and as the judgment refers to the principal decided cases, it will be of value to members of the profession who may have to examine similar questions. We copy the report below:

ENOCH MORGAN SONS' CO. v. SCHWACHHOFER.

Plaintiff had for many years made and sold a soap named by him "Sapolio." Each cake sold was inclosed in two wrappers, a tin-foil and a blue one, the wrappers containing the name of the soap and certain printed words and cuts. Defendant offered for sale a soap he called "Saphia." Each cake was inclosed in a tin-foil and a blue wrapper, containing printed words and figures differing entirely from those on plaintiff's wrappers, but having a general resemblance and calculated to deceive the public into a belief that the soap was that manufactured by plaintiff. Held, that plaintiff was entitled to an injunction restraining defendant from vending his soap in the tin-foil and blue wrapper.

For the accomplishment of a fraud in such cases as this, two circumstances are required: First, to mislead the public, and, next, for defendant to preserve his own individuality.

Action to restrain defendants from infringing plaintiff's trade-marks. Plaintiff had for many years previous to the commencement of the action manufactured a soap designed for cleaning and polishing, which was named "Sapolio." It had extensively advertised this preparation, and it became known in the market and by numerous consumers under the name mentioned. The soap was sold in cakes of a convenient size. Each cake was inclosed in two wrappers, one a square sheet of paper covered with tin-foil, and the other a strip of paper about an inch and a half wide, which was blue on the outside. Each wrapper contained the name "Sapolio," and cuts and printing referring to the article and its use. The devices on the wrappers were registered as trade-marks. Defendant, after plaintiff's article became well known, began the manufacture of a similar article, which he named "Saphia Transparent." He offered it for sale in cakes similar in size to those made by plaintiff, inclosed in two wrappers (tin-foil and blue) of the same size and shape of plaintiff's, but containing different cuts and printed words. The general appearance of the packages made by defendant and plaintiff was the same, and the general public would be easily led into purchasing one for the other. Such other facts as are material will appear in the opinion.

LAWRENCE, J. It is quite difficult in actions of this character, to precisely draw the line between those cases in which the plaintiff is entitled to relief and those in which relief should be denied. The decisions are conflicting, and many of them irreconcilable, but in this case, after fully considering the evidence, I am of the opinion that the plaintiffs are entitled to a portion at least of the relief which the complaint demands.

Upon principle no man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another. In the consideration of this case, I shall lay out of view the United States statute in relation to trade-marks, because that provides that "no-

thing in this chapter shall lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had, if the provisions of this chapter had not been enacted."

I do not therefore regard the plaintiffs as being compelled, in order to obtain the relief they seek in this action, to show that there has been an imitation of the trade-mark, which the plaintiffs have filed in the patent office.

It would seem that the true rule is laid down in the case of *Edelston v. Vick*, 23 English Law and Equity Reports, pp. 51 and 53, where Vice-Chancellor Wood, adopting the language of Lord Langdale in *Groft v. Day*, 7 Beaven, pp. 84 and 87, says: "That what is proper to be done in cases of this kind depends on the circumstances of each case. . . . That for the accomplishment of a fraud in each case, two circumstances are required, *first to mislead the public, and next to preserve his own individuality.*" Commenting further upon the language of Lord Langdale in *Groft v. Day*, the vice-chancellor proceeds: "Now in that case of *Groft v. Day*, there was, as Lord Langdale said, many distinctions between the two labels, and in this case before me just as in that of *Groft v. Day*, any one who takes upon himself to study the two labels, will find even more marks of distinction than were noticed in argument. *But in this case as in that, there is the same general resemblance in color. Here there is the same combination of colors, pink and green.* There is the same heading, "Her Majesty's Letters Patent" and "Solid Headed Pins" and the name D. F. Taylor, with the words "exclusively manufactured" upon the two labels, which are of precisely the same size, and the scrolls in the same form, "and exclusive patentee" in an exactly similar curved line, nor does it rest only with the general resemblance of the outer wrappers: *The papers in which the defendant's pins are stuck bear also a very great similarity; they are as like as can be to the papers in which the plaintiff's pins are stuck.*"

Then, after stating that he agrees that there must be an intent to deceive the public, the vice-chancellor holds that the defendants, both in the outer and inner wrapper, made a palpable imitation, with the intent to deceive the public, and he accordingly restrained them. I have referred to this case at length because it

seems to me to be peculiarly in point, but there are several authorities in our own courts which uphold the same doctrine. In *Williams v. Spence*, 25 How. Pr. Rep. 307, Monell, J., says: "The only question to be determined therefore in this case is whether the labels, devices and handbills used by the defendants, as set forth in the complaint, are calculated to, and do, deceive the public into the belief that the soap that they are selling is the soap made and sold by the plaintiffs. * * * The oral evidence, that the labels, devices and hand-bills used by the defendants are calculated to deceive the public also preponderates, and an inspection of the respective labels, devices and hand-bills satisfies me that the public would be readily deceived and purchase the defendant's soap under the belief that they were purchasing plaintiff's."

In *Lea v. Wolf*, 13 Abbott (N. S.), 391, Mr. Justice Ingraham says: "*The color of the paper, the words used, and the general appearance of the words when used, show an evident design to give a representation of those used by the plaintiffs. It is impossible to adopt any conclusion other than that the intent was to lead purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying.*" See also *Cook v. Starkweather*, 18 Abbott (N. S.), 292. And in *Lockwood v. Bostrick*, 2 Daly, 521, it was held, "that a party will be restrained by injunction from using a label as a trade-mark, resembling an existing one in size, form, color, words and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when compared, and yet not so much so that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it, and he had a very perfect recollection of the other trade-mark." And in *Kinney v. Busch*, 16 Am. L. Reg. (N. S.) 597, Mr. Justice Van Brunt says: "A careful inspection of the labels in question shows beyond a doubt that those of the defendant were adopted in order to deceive the public into supposing when they purchased the cigarettes of the defendant's manufacture they were purchasing those of the plaintiffs. I am satisfied from the evidence in this case that the intention of the defendant has been from the first to

make an article as nearly as possible resembling that manufactured by the plaintiffs, and to put it off upon the public as the same article."

I am also satisfied that it was the intention of the defendant, in adopting the blue and tin-foil wrappers, and in printing on them the directions for use in language so closely resembling that employed by the plaintiffs, to impose upon the public and to lead purchasers to believe that in purchasing the defendant's article they were in fact obtaining the *sapolio* of the plaintiffs. In this connection the wonderful similarity of the color of the inside of the tin-foil wrapper, used by the defendant, with that used by the plaintiff, should not be forgotten. The whole case, to my mind, shows an intention on the part of the defendant to avail himself of the reputation which the plaintiffs had acquired in the market for their *sapolio*, by their enterprise and ability and by the large expenditures which they had made in bringing the *sapolio* to the attention of the public.

It appears that the plaintiffs have been for many years engaged in manufacturing *sapolio*, that the article has acquired a great reputation, and that the plaintiffs have expended very large sums of money in advertising. The evidence shows that the defendant, after analyzing a cake of *sapolio*, and ascertaining how it was made, set about making an article similar in character, color and appearance to that of the plaintiffs. This he may possibly have a right to do, but when the court finds that the defendant, after having possessed himself of the secret of the manufacture of the plaintiffs, has in addition coined a name much resembling *sapolio*, in appearance, and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of *saphia* in wrappers also closely resembling the plaintiffs', both in their external and internal appearance, as to color, size, and partially as to inscription and directions for use, the court has in my judgment the power to interfere, and should exercise its power. It is claimed that the plaintiffs cannot have an exclusive right to use tin foil or ultra marine blue colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere

where it is apparent that there is an imitation of the plaintiff's label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper as used by the defendant is calculated to deceive purchasers, and I think that it is very clearly proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market.

A critical and careful examination of the two packages will undoubtedly reveal distinctions and differences between the labels, and the devices thereon are different; but there is such a general resemblance, that, to borrow the language of the vice-chancellor in *Edleston v. Vick*, *supra*, "the court or jury would be bound to presume that it was not a fortuitous concurrence of events which has produced this similarity; it would be irrational not to rest convinced that this remarkable coincidence of appearance, external and internal, is the result of design."

In the case of *Abbott v. Bakers and Confectioners Tea Association*, Weekly Notes, 1872, p. 31, an injunction has been issued restraining the defendants from issuing wrappers which were in imitation of those of the plaintiffs. On appeal the Lord Chancellor said, "that though no one particular mark was exactly imitated, the combination was very similar, and likely to deceive; that it was true that there was no proof that anyone had been deceived, or that the plaintiffs had incurred any loss, but where the similarity is obvious, that was not of importance." The appeal was therefore dismissed. See case reported below. Weekly Notes, 1871, p. 207. This last case seems to be decisive of the question now under consideration. See, also, *Lockwood v. Bostwick*, 2 Daly, 521; *Godall v. Hazard*, 49 How. 10.

I am, therefore, of the opinion that the plaintiffs are entitled to an injunction restraining the defendant from vending saphia in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also to sell saphia, nor to restrain him from the use of that name, or of the figure or device upon the label; but I do intend that he shall abstain from dressing his goods in wrap-

pers so closely resembling the plaintiffs', as to enable him to deceive the public and to perpetrate a fraud; and that he shall not sell saphia as and for sapolio. In other words, he must sell under his own colors and not under those of the plaintiffs.

Judgment accordingly.

CLERICAL BANKRUPTS.—Clergymen in the United States are entitled to take advantage of the Bankrupt Act, and the last issue of the *Chicago Legal News* refers to the fact that R. W. Patterson, "the veteran Presbyterian Minister of Chicago," has just filed a petition in bankruptcy. Our contemporary remarks: "It seems hard for a man who has devoted so many years to labor in the Lord's vineyard as Dr. Patterson has, to have to go through the bankrupt court in his old age." Before expressing sympathy with the venerable pastor, one would like to know how the debts were incurred. One would like to be sure that the Doctor has not brought himself into his unpleasant situation by "selling short," or by the bursting of a "corner."

GENERAL NOTES.

—A curious judgment was recently delivered by a sessions judge in one of the Bengal districts. Four persons were brought before him on a charge of murder, and were duly convicted; but in passing sentence the judge apparently found himself in a difficulty. "There is no doubt," said he, "that all four are guilty of murder, and are therefore liable to be hanged; but I do not think it is necessary for four lives to be taken for one, but that one case of capital punishment will be enough for example!" Although, in addition to this, he said further on that "all four seem to have been equally active," yet he concluded by sentencing the apparently oldest and strongest of the prisoners to death, and the other three to imprisonment for life. It is needless to say that on an appeal to the High Court the sentence was not confirmed. Yet such is the reading of the law by some of the Indian Judges—*Albany Law Journal*.

EVERY DOG HAS HIS DAY.—In the Croyden, England, County Court, in a case entitled *Saunders v. Evans*, the English idea of giving every one a chance was well illustrated. Plaintiff sought to recover damages for the loss

of a lamb, which had been killed by defendant's dog. "In answer to his honor, the plaintiff said he could not prove that the defendant was aware that the dog was in the habit of biting other animals." "His honor thereupon remarked that by the law of England a dog was allowed his first bite. Assuming that the lamb did die through an attack made by the defendant's dog, plaintiff was not entitled to recover unless he could say that the defendant was aware that the dog had previously misconducted himself in a similar way. He, therefore, nonsuited the plaintiff, and advised the defendant to take better care of his dog in future." It is suggested by a correspondent of the *Solicitors' Journal*, that there is a statutory provision covering the case. In that case the Court may have erred, but it is to be assumed that he stated the common law correctly.

TRIAL BY JURY IN RUSSIA.—While some older countries have been debating the advantages of continuing the time-honored institution of trial by jury, Russia has been trying the experiment for the first time. It is barely ten years since it was introduced, and according to a correspondent of the *Times* it leads often to curious results. A prisoner after making a clean breast of it and confessing his guilt in Court, sometimes finds the jury differ with him, and a verdict of "not guilty" is returned. This arises in part, says the correspondent, from the rough-and-ready way in which a jury, especially if composed of peasants, will look at the prisoner and the whole circumstances, irrespective of evidence. A notorious offender should be punished—a decent citizen should be acquitted, they think. They listen but little to the advocate's eloquence, and fail to comprehend the need of him. "What difference is there between paying an advocate and bribing a judge?" they argue. Then again, the Russian criminal law fixes minutely the punishment for each item of the category of crime, and scarcely leaves any latitude to the judge for extenuating circumstances and the like. Now Russian juries have their own methods of looking at the various kinds of wrong-doing, and what the code defines as very sinful indeed and deserving of transportation to Siberia, or penal servitude with hard labor, may appear to the enlightened twelve a very minor offence, or no offence at all—a thing they would, under

certain circumstances do themselves. In many of these trials the jury will weigh its own plain common sense and kindly feeling for a fellow-creature against the clearest evidence, and will find the prisoner "not guilty." In all cases of assault, cruelty or dishonest dealing in matters commercial, the mind of a jury of Russian peasants inclines towards mercy. The position of women is so low in Russia that "husband's rights" are alone recognised, and these include the privilege of enforcing his will by chastisement if necessary; and no jury will convict unless the assault has been one of a serious kind indeed. Juries of all classes are, however, very severe in cases of "crimes against the Deity," as they are called. In conclusion, it must be borne in mind that the Ministry at St. Petersburg has all but unlimited powers and the so-called "independence of the judges" exists only in name.

NOTICES OF PUBLICATIONS.

BENJAMIN ON SALES.—A second edition of the "Treatise on the Law of Sale of Personal Property," by Mr. J. P. Benjamin, Q. C., has appeared in New York, the United States editor being Mr. J. C. Perkins. In this edition about five hundred new cases are added, English as well as American. A contemporary remarks with regard to the author: "Mr. Benjamin is one of the products of the Southern States, which the profession and the country generally could not well afford to lose. At the close of the war, after more than thirty years of practice at the bar, service in the United States Senate from Louisiana and in the Cabinet of the Confederate States, he went to England, where his ability was at once recognized. Three years after, he was made Queen's Counsel, and in 1872 received a patent of precedence under the Great Seal. In 1868 he published his treatise on the Sale of Personal Property, which is a most valuable contribution to the literature of the law, as a full and accurate collection of cases, and a masterly deduction of principles. In 1873, the second English edition was published."

TO CORRESPONDENTS.—The opinion of English counsel in the case of *Brassard v. O'Farrell* will appear in our next issue.

The Legal News.

VOL. I. APRIL 13, 1878. No. 15.

THE O'FARRELL CASE.

We insert, at the request of a correspondent, an opinion given by counsel in England on a case submitted to them in the matter of Mr. O'Farrell. This opinion was obtained, we presume, with a view to prosecuting an appeal to the Privy Council. Pending the decision of that tribunal, it is judicious to refrain from discussion of the questions involved. We might remark, however, that those who have had much acquaintance with opinions of counsel—not excepting even gentlemen as deservedly eminent as Sir J. F. Stephen and Mr. Benjamin—will hardly be disposed to pay the Quebec Court of Review so poor a compliment as to imagine that the unanimous judgment of that tribunal derives much additional weight from the opinion now published. Courts and Judges differ, and learned counsel differ with at least equal facility, and for anything we know, an opinion diametrically opposite may have been obtained on the other side from counsel of like celebrity.

DISSENTIENT OPINIONS.

An article which is copied below from a contemporary, sets forth the reasons which may be adduced in behalf of the suppression of dissentient opinions in appellate tribunals. We reproduce this reply for the purpose of completing and closing the discussion for the present. It may be remarked that as our contemporary restricts his argument to "supreme appellate tribunals," it hardly applies, so far as the Province of Quebec is concerned, to the Supreme Court of Canada. For the direct appeal to the Privy Council still exists, and the highest Court of the Province has formally decided that even a concurrent appeal, as the law stands at present, may be taken to the Supreme Court and to the Judicial Committee of the Privy Council. See *The City of Montreal & Deslin*, p. 151. Conflicting decisions might, therefore, be pronounced at Ottawa and London, and in that event, Her Majesty's Judicial Committee would, no doubt, exercise their discretion,

and allow an appeal from the judgment of the Supreme Court, which, therefore, can hardly be considered the supreme appellate tribunal for Quebec.

As our contemporary agrees with us in thinking "that there should be no cast-iron rule, but that the matter should be left to the discretion and wisdom of the Judges themselves," the difference between the views which we have expressed and those copied elsewhere is apparently a very narrow one. No one can deprecate more earnestly than we do lengthy unwritten arguments, by Judges who dissent in ordinary cases, in favor of their individual opinions. Such a practice is more than a waste of public time, and we think professional opinion ought to be brought to bear in every legitimate way to put an end to it.

DISSENTING JUDGMENTS.

[Canada Law Journal.]

Our former article thus entitled has provoked a good deal of hostile criticism in the columns of our Quebec contemporary, *The Legal News*. The practice of the Privy Council in delivering one judgment which represents the joint opinion of the Court, though pronounced an admirable practice by the last editor of Austin's Jurisprudence, finds no favour with the Montreal critic. The sole reason given is the very insufficient one "that the suppression of dissentient opinions has proved highly inconvenient in several cases.....in passing over important issues on which both parties desired an opinion." It may gratify the individuals interested in the particular case to have all its niceties explored, and each judge giving his views thereon; but regarding the matter from the broader point of view of the profession, such judgments do not declare the law except in so far as the judges concur in the matter decided. All else is in the nature of *obiter dicta* and the accumulation of such opinions in the reports is by all thoughtful jurists deprecated. Life is too short for the professional man to master the growing accumulations of the law, even when most carefully expurgated in the reports. Why should he further be compelled to waste time in finding out what is decided by going through the reasonings of each particular judge and aggregating the results? With all deference to opposite views, we submit that

this is the work which the judges themselves should do; and, unifying their conclusions so far as may be, the result should be given by one voice as the judgment of the Court.

We are speaking, of course, of supreme appellate tribunals, and no better illustration can be given of the two systems than a comparison of the reports in the House of Lords and those in the Privy Council. If the most cumbrous plan for embodying judge-decided law were to be chosen, surely the method of the Law Lords could not be improved upon. If the most scientifically precise plan were to be sought, where could one better look for a model than in the best judgments of the Privy Council (say those of Lord Kingsdown)? When considering the import of a decision in the Lords, one must always bear in mind the observation of Lord Westbury, that what is said by a Lord in moving the judgment of the House of Lords does not by any necessity enter into the judgment of the House: *Hill v. Evans*, Jur. N.S., p. 528. The same matter is more elaborately put by Chief Justice Whiteside in a case which gave the Irish Bench a deal of trouble: "We are admonished," he says, "that it is the very decision of the House of Lords we are to obey, and not the observations of any noble Lord in offering his opinion. Noble Lords in giving their judgment often differ from each other in their reasons; they cannot all be right in opinions which conflict. It is not, therefore, the peculiarities of individual opinion which are to be obeyed, but the judgment of the House itself:" *Mansfield v. Doolin*; Ir. R. 4 C.L. 29.

Our contemporary proceeds to affirm that the suppression of dissentient opinions is deceptive in itself, is unfair to dissenting judges, and is calculated to retard the progress of jurisprudence. In contravention of these positions, anything that we could say would be of little weight as compared with the views which eminent judges have left on record. Of these, two may be cited, one from an English, the other from an American source. "I very much wish," is the language of Lord Mansfield to Sir Michael Foster, "that you would not enter your protest with posterity against the unanimous opinion of the other judges.... The authorities which you cite prove strongly your position; with construction of the majority is agreeable

to justice; and therefore, suppose it wrong upon artificial reasonings of law, I think it better to leave the matter where it is. It is not *dignus vindice nodus*."

In a letter of Mr. Justice Story to Mr. Wheaton, the reporter, he writes as follows: "at the earnest suggestion (I will not call it by a stronger name), of Mr. Justice Washington, I have determined not to deliver a dissenting opinion in *Olivera v. The United States Ins. Co.* 3 Wheat. 183. The truth is, I was never more entirely satisfied that any decision was wrong than that this is, but Judge Washington thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary reasons weakens the authority of the Court, and is of no public benefit."

Of what use or value is a dissenting opinion in the Supreme Court? The decision of the majority fixes the law irrevocably, and their conclusions can be modified or reversed by nothing short of legislative authority. It is urged that the minority should proclaim their views—that they should take means to let the world know that they are not to be held responsible for the error of the majority. We submit that such self-assertion is made at the expense of the Court of which the minority forms a part. So our contemporary goes on urging that even where the decision turns on a question of evidence, an injustice may result from the suppression of dissent. For example, he says, the decision of the majority may attach a serious imputation of fraud to an individual. But surely this is regarding the reports from a personal instead of a professional view-point—the fallacy which pervades the whole of the article in question. For the purpose of exculpating or mitigating the guilt of the individual, the dissent may be of consequence; but it is a mere surplusage when the question is what does such a case decide? The *Central Law Journal*, one of the best informed of our American legal exchanges, heartily endorses the views we have expressed on this subject.

The Legal News is vexed at our slighting allusion to the Lower Canadian decisions—their uncertainty and want of unanimity. But his own correspondent, "S," points the contrast between the dignified self-repression of a Story and the effusiveness of those Courts where

"each judge thinks his own opinion quite as good as that of any other judge, or bench of judges expressed at different times, and rather better."

The writer of the letter in *The Legal News* continues in this strain:—"I have very little hesitation in saying that the decisions of our Courts have a larger degree of uncertainty about them than those of the Courts of any country with which we are familiar. And why? Because the judges in our Courts have not sufficient unanimity—or unity, perhaps, would express it better—in their bearing towards the jurisprudence of the Province as a whole; but treat each case separately and individually, and sometimes with very little regard for the opinions of each other."

We agree with our contemporary in one of his remarks, and that is that there should be no cast-iron rule, but that the matter should be left to the discretion and wisdom of the judges themselves, to decide when they should yield their individual opinion, and refrain from entering a dissent. As we know, some judges have no discretion, even when an Act of Parliament confers it upon them. The initial numbers of the Supreme Court Reports of the Dominion appear to us of evil omen from the length and repetition and conflict in the different judgments reported, and they suggested our protest against the manner of enunciating the conclusions of the Court. In such a Court, it would be well, in our view, to follow the English and United States precedents to which we have adverted, and, without making use of a "pious fraud" by concealing the dissent of any member of the Court, yet not emphasizing that disagreement by reporting it at length, we would in every such case hope that the old distich might be verified:

"The judge dissents. Kind Lethe on its banks
Receives his honour's useful gift with thanks."

COMMUNICATIONS.

BRASSARD V. O'FARRELL.

To the Editor of THE LEGAL NEWS:

Sir,—As the judgment of the Court of Queen's Bench in *O'Farrell v. Brassard* furnished the subject of an editorial in THE LEGAL NEWS, and was therein highly commended, I think it is but justice to those who may not take the same

view of the case, that the subjoined opinion should be published in your columns.

In addition to the statement of facts, the eminent counsel had before them all the documents, extracts of the record and texts of local law which had any bearing on the case, and which I had taken good care to transmit to them.

I have the honor to be, Sir,

Your most obedient servant,

W. C. LANGUEDOC.

Quebec, April 2, 1878.

JOHN O'FARRELL, Appellant, Plaintiff in Prohibition in Court below, v. THE COUNCIL OF THE SECTION OF THE DISTRICT OF QUEBEC OF THE BAR OF THE PROVINCE OF QUEBEC, THE SYNDIC, A. R. ANGERS AND H. BRASSARD, Respondents. Defendants in Prohibition in Court below.

Case Submitted to Counsel.

The Bar of the Province of Quebec is incorporated by Act of Parliament, and invested with the following rights:—

To admit candidates to the study of the law.

By its diploma, signed by the Batonnier, countersigned by the Secretary, and sealed with the seal of the section of the Bar, to confer the right of practising as an Advocate, Barrister, Attorney, Solicitor and Proctor-at-Law, in all Courts of the Province, upon those to whom it is granted.

To maintain the discipline and honor of the Bar.

To censure any member guilty of any breach of discipline or any action derogatory to the honor of the body, to deprive such member of the right of voting and even of assisting at the meetings of the section, and to suspend him from his functions.

All these powers are conceived to be franchises of the Corporation of the Bar.

The council of each section, with regard to such section, represents the members of the Bar, whenever the interests or duties of the profession require it.

These are the principal features of the Act of incorporation.

In 1874, the Syndic of the Bar, section of the district of Quebec, as bound to do, submitted to the council an affidavit of one Hypolite Brassard, relating to certain conduct of the appel-

lant, a member of the said section. The council thereupon ordered the Syndic to bring an accusation against the appellant, for conduct derogatory to the honor of the body. This was done conformably to the provisions of the Act of incorporation; the appellant was summoned, appeared, pleaded; evidence as well for the accusation as for the defence was adduced before the council, the appellant was heard in his defence, and in February, 1875, at a meeting of the council duly convened, he was by a unanimous vote found guilty of conduct derogatory to the honor and interests of the Bar, and was suspended for three months.

The appellant conceived himself entitled to prohibition, to restrain the council from proceeding further against him, and presented a petition to a Judge of the Superior Court, and requested him to append to it the authorization to proceed in prohibition, required by the Code of Procedure. The Judge declined to authorize proceedings in prohibition, and in consequence none could be or were in fact taken before the Superior Court. In this condition of facts, the appellant took a writ of appeal *de plano* out of the Court of Queen's Bench; it was returned in due course, and the judgment of the 22nd June, 1875, was rendered, ordering a writ of prohibition to issue out of the Superior Court. Upon the production of this judgment to the Prothonotary of the Superior Court, this officer assumed it to be equivalent to an order of a Judge of the Superior Court, issued the writ, and proceedings were then for the first time taken before the Superior Court. A judgment was rendered in the latter Court in the terms of that of the Queen's Bench of the 22nd June, 1875.

This judgment of the Superior Court was inscribed for revision before three Judges of the same Court, and reversed.

An appeal was taken in turn from this judgment of the Court of Review to the Court of Queen's Bench, who reversed the judgment. A motion for leave to appeal to Her Majesty in Her Privy Council, from this last judgment of the Court of Queen's Bench, has been made, and stands for argument in March next.

Whether a member of the Quebec Bar behaved in an unbecoming manner or not, is a matter of comparatively little importance. But whether the Courts have the right, by prohibi-

tion, to interfere with the councils of sections of the Bar, in the exercise of the disciplinary powers over members conferred upon them by law as a corporate franchise, and whether the Court of Queen's Bench, a Court of exclusively appellate civil jurisdiction, can inaugurate proceedings in a Court of original jurisdiction, are matters of grave importance to the Bar and public.

The opinion of counsel is requested upon the following questions in relation to the foregoing case.

1st. Did the council of the section of Quebec of the Bar of the Province of Quebec, in ordering an accusation to be brought by the Syndic against the appellant, in hearing him in his defence, in finding him guilty of conduct derogatory to the honor of the body, and in suspending him, exercise a corporate franchise and perform a mere corporate act?

2nd. If so, could they be interfered with, or restrained by prohibition?

3rd. If the proceedings of the council were judicial in their nature, would prohibition lie, when the Act of incorporation provides an appeal to the general council of the Bar, and enacts that no judgment of a council of section shall be reversed, except by means of such appeal?

4th. Are the disciplinary powers vested in councils subject to the condition precedent, that the Corporation of the Bar shall frame and adopt by-laws defining infractions of discipline and what actions are derogatory to the honor of the body?

5th. Whatever lawful remedy (other than the appeal to the general council) be resorted to against decisions of councils, can the finding by them that a member has been guilty of conduct derogatory to the honor of the Bar, under any circumstances, be challenged or equired into by Courts in collateral proceedings, such as prohibition, *mandamus* to restore or action?

6th. Is the refusal of a Judge of the Superior Court to authorize proceedings in prohibition a definitive judgment of the Superior Court, from which appeal will lie to the Court of Queen's Bench?

7th. Has the Court of Queen's Bench any jurisdiction by appeal over proceedings which have never come under the previous cognizance of a Court of original jurisdiction?

8th. Was Hypolite Brassard a party to the accusation of the appellant by the Syndic, and had the Court of Queen's Bench jurisdiction in this case to impose upon him the costs in all the Courts through which it has so far gone, or was he a mere witness beyond the reach of any such condemnation?

W. C. LANGUEDOC,
Advocate.

Quebec, January 10, 1878.

JOINT ANSWERS OF SIR JAMES F. STEPHEN, Q.C.,
AND MR. JUDAH P. BENJAMIN, Q.C.

We are of opinion,

1. That the council of the Quebec section in the proceedings against the appellant were acting in the exercise of a corporate franchise under their Act of incorporation.

2. That no Court had power to interfere with them unless they were usurping a jurisdiction not conferred on them, and in this case we think they were not acting without jurisdiction.

3. If the proceedings were judicial there would be power in our opinion in any Court of justice exercising general jurisdiction to prohibit the council from usurping jurisdiction; but we think that in the present case there was no power to prohibit, as the council were exercising jurisdiction conferred by statute.

4. No. The Bar, like army or navy officers, are bound by honor, as well as by statutory and common law. It is common practice to try an officer on a charge of "conduct unbecoming an officer and gentleman," and the Court determines whether the acts specified are *unbecoming*. So the council of the Bar may determine whether the conduct of a barrister is or not derogatory to the honor of the Bar. Their decision under their Act of incorporation cannot be questioned in Courts of law, where they are acting *bona fide*. Possibly, on proof that they were acting maliciously, under pretext of exercising their proper jurisdiction, some remedy might be found, but no such case is before us.

5. Answered above in No. 4.

6. 7 and 8. We prefer not to give an answer to these questions. They involve points of procedure under the local laws, to which the Privy Council would attach little or no weight, and on which we could only venture an opinion after an examination of local statutes, without

any good purpose. We may say in general that upon all the main points of the case we think that an appeal would be successful, and that the judgment of the Superior Court, as given in the opinion of Mr. Justice Stuart, is substantially sound, and will be restored.

J. F. STEPHEN,
J. P. BENJAMIN.

Temple, March 5, 1878.

QUEBEC DECISIONS.

The following is a digest of the principal decisions reported in the 3rd volume of the Quebec Law Reports (1877):

Accident.—See *Negligence*.

Adjudicataire.—Under the Code of Civil Procedure, the adjudication of an immoveable is always without warranty as to contents, and the *adjudicataire* cannot, by opposition *afin de conserver* on the proceeds of sale, claim the value of a deficit in contents.—*Pelletier v. Chassé*, 3 Q. L. R. 65; *Douglas v. Douglas*, Ib. 197.

Affidavit.—1. In an affidavit for attachment before judgment, the words "may lose his debt or sustain damage" held sufficient.—*Andersen v. Brusguard*, 3 Q. L. R. 287.

2. Affidavits to procure revendication, *capias* or attachment, are completely exhausted by the issue of the writ, and are of no value as proof in the case. *Crehen v. Hagerty*, 3 Q. L. R. 322. But otherwise held in *Bergevin v. Vermillon*, Ib. 134.

3. An affidavit for *capias ad respondendum*, alleging a debt to exist, need not state when the same was contracted, nor show that it was contracted within the five years next preceding.—*Maguire v. Rockett*, 3 Q. L. R. 347.

4. Nor that the sale and delivery were made to the defendant, when they are alleged to have been made "at his instance and request."—Ib.

5. When the facts upon which his belief is based are sworn to directly, and not as hearsay, the deposant is not bound to disclose the name of any informant.—Ib.

Agent.—A merchant in Quebec, acting as the agent of a principal in Ontario, and as such receiving goods subject to freight and demurrage, held personally liable for such charges, although the master of the vessel knew that the merchant so receiving the goods was acting as agent.—*Thwaites v. Coulthurst et al.*, 3 Q. L. R. 104.

2. But the contrary would be held if the merchant were acting for a home principal.—*Ib.*

3. An agent doing an act that injures a third party is personally liable to the person injured, though he only carried out the orders of his principal, if such orders were illegal.—*Holton & Aikins*, 3 Q. L. R. 289.

See *Election Law*.

Appeal.—1. There is no appeal to the Court of Queen's Bench from a judgment rendered by the Superior Court in proceedings concerning municipal matters, and falling under the dispositions of Chapter 10 of the Code of Procedure.—*Danjos & Marquis*, 3 Q. L. R. 335.

2. The amount demanded determines the right of appeal, and not the amount of the judgment appealed from.—*Boudreau & Sulte*, 3 Q. L. R. 336; *G. T. R. Co. & Godbout*, *Ib.* 346.

3. There is no appeal to the Circuit Court from a decision of a County Council sitting in appeal on a valuation roll.—*Meunier et al. & Corporation of County of Levis*, 3 Q. L. R. 345.

4. There is an appeal to the Queen's Bench from a judgment homologating an uncontested report of distribution.—*Shortis & Normand*, 3 Q. L. R. 382.

5. The proceeding by opposition, granted to the creditor under 761 C. P., does not deprive him of his appeal.—*Ib.*

Attorney.—See *Costs*.

Bet.—No action lies for the recovery of a bet made on a batteau race, this not coming within the exception mentioned in Art. 1927 C.C.—*Wagner v. L'Hôtie*, 3 Q. L. R. 373.

Capias.—See *Affidavit*.

Certiorari.—A writ of *Certiorari* may issue after the six months from conviction, provided the application has been made within the six months.—*Ex parte Fiset*, 3 Q. L. R. 102.

Clerical Intimidation.—See *Election Law*.

Collision.—1. A steam tug proceeding down the St. Lawrence met two barques, and in passing between them came into collision with one which ported her helm. *Held*, that the tug was in fault for not keeping out of the way, and the barque also for not keeping her course.—*The Rosa*, 3 Q. L. R. 21.

2. Admissions of a master of a ship respecting a collision are evidence against the owners, although made after the collision; but the party affected by them may give counter evidence.—*Ib.*

3. Where two ships are each to blame for a collision in Canadian waters, an Act of the Parliament of Canada, which precludes recovery of damage by either, *held* operative, although the Admiralty rule which divides the loss prevails in England and has been recently applied in a case of collision on Canadian waters, on an appeal to the Privy Council, but without the Act being brought under special notice there.—*The Langshaw*, 3 Q. L. R. 143.

4. In a case of collision, the fault being mutual, the Admiralty rule will apply, as between the owners of cargo and the delinquent ships, dividing the loss; each ship is answerable for a moiety.—*Ib.*

5. On an appeal to the Privy Council, where their Lordships name assessors, an opinion on a nautical point given by Canadian assessors may be overruled.—*Ib.*

Common Carrier.—There is an implied engagement on the part of public carriers of passengers for hire towards those carried that they shall not be exposed to undue or unreasonable danger in embarking on or landing from the vessels of such carriers. And therefore a Steamboat Company, being a public carrier, using a wharf for the purpose of embarking and landing passengers, is bound to take all possible precautions for the prevention of accidents by the crowding of the public on the wharf, and any dangerous portion of the wharf should be sufficiently lighted at night to ensure the protection and safety of passengers.—*Borlase v. St. L. S. N. Co.*, 3 Q. L. R. 329.

Contrainte par corps.—See *Guardian*.

Costs.—An attorney *ad litem* cannot recover from his client costs in suits which are still pending and undecided.—*Molony v. Fitzgerald*, 3 Q. L. R. 381.

2. An attorney is not bound to refund the costs which he received by distraction granted him, though the judgment under which he obtained them was afterwards set aside by the Court of Appeal.—*Holton v. Andrews et al*, 3 Q. L. R. 16.

3. Even if a party who has succeeded in first instance succeeds also in Review, the Court will not allow him costs in Review if it is of opinion that fraud has been proved against him, and that he succeeds only on technical grounds.—*Blouin v. Langelier*, 3 Q. L. R. 272.

Costs, Security for.—1. A seaman of a foreign

vessel suing for wages, and describing himself as "of Norway, now at Quebec," will be compelled to give security for costs.—*Andersen v. Brusgaard*, 3 Q. L. R. 287.

2. Where, by a letter addressed to the suppliant, the Public Works Department offered the sum of \$3,950 in full settlement of the suppliant's claim against the Department, an application on the part of the Crown for security for costs was refused, on the ground that the Crown in this case could suffer no inconvenience from not getting security, and the application was not made in proper time.—*Wood v. The Queen*, 3 Q. L. R. 17.

County Councils.—County Councils have the same power as Local Councils to pass by-laws prohibiting the sale of intoxicating liquors.—*Hart v. Corporation of County of Missisquoi*, 3 Q. L. R. 170.

Curf.—See *Election Law*.

Damages.—1. Physical and mental pain may give rise to the action of damages resulting from a bodily injury.—*Pelletier v. Bernier*, 3 Q. L. R. 111.

2. The measure of damages for the detention of a vessel after a collision is the amount she can earn while unemployed by reason of it.—*The Normanton*, 3 Q. L. R. 303.

Decret.—See *Adjudicataire*.

Delivery.—Absence of delivery is only an indication of fraud, and it may be rebutted by other presumptions equally strong.—*Bell & Rickaby*, 3 Q. L. R. 243.

Deposit.—See *Notice of Deposit*.

Election Law.—1. The threat by a Catholic priest to refuse the Sacraments to those who should vote for a candidate, constitutes an act of undue influence within the terms of clause 258 of the Quebec Election Act.—*Hamilton v. Beauchesne*, 3 Q. L. R. 75.

2. Where the *curfs* of a county take an active part in an election in favor of one of the candidates who, in a speech to the electors, declared himself the candidate of the clergy, that he was brought out by the clergy, and that without the assurance of their support he would not have accepted the candidature, the *curfs* will be considered agents of the candidate, and the latter will be responsible for their acts. Therefore, if a *curf*, so constituted agent, threatens his parishioners in the presence of a candidate with a refusal of the sacraments in case they

vote for the opposite candidate, the candidate present will be deemed to have consented to this act of undue influence and to have approved it, and will be disqualified, if in a speech pronounced some hours afterwards he declares himself the candidate of the clergy, and does not disavow the threats or free himself otherwise from responsibility.—*Ib*.

3. It is "treating" within the meaning of Sec. 257 of the Que. Election Act, for a candidate to give a glass of liquor to the representatives of the two candidates and the deputy returning officer, in the poll, saying: "Gentlemen, if you wish to take a glass of brandy there is some in the room; go and help yourselves, but before you go, go and vote for whom you like."—*Ib*.

4. A deed given to transfer property to a candidate merely to qualify him, and with the intention that the property shall for all other purposes remain in the possession of the transferor, is insufficient under Sect. 124 of the Election Act, even though it be clothed with all the formalities required for the valid transfer of the property. And the proof of such intention appears in the fact of simulated payment of the price, and the transferor remaining in possession of the immovable as proprietor.—*Ib*.

5. Even if the petitioner succeeds, each party will be ordered to pay his own costs where the defendant succeeds in a recriminatory case under section 55 of the Election Act.—*Ib*.

6. The Provincial Legislature, in enacting the Quebec Controverted Elections Act, having created the Superior Court a tribunal for the purpose of trying election petitions in a manner which should make its decisions final, the prerogative right to admit an appeal from such decisions to Her Majesty in Her Privy Council does not exist.—*Landry v. Thérberge*, 3 Q. L. R. 202.

7. Under the Election Act of 1875, (1) the valuation roll is conclusive as to the value of the property. (2) No one can be on the list of electors if he is not on the roll. (3) All those who by the roll appear qualified should be on the electoral list, unless there be personal disqualification which does not appear on the roll.—*Electoral Lists of Kamouraska*, 3 Q. L. R. 308.

8. The Municipal Code directs how a valuation roll may be attacked, and in a collateral

proceeding, such as a contestation of the electoral lists, what has been finally decided as to this roll cannot be questioned.—*Ib.*

9. The Secretary-Treasurer has no right to correct the valuation roll.—*Ib.*

10. A and B own conjointly and in equal shares, a property valued on the roll at \$200 or \$300. Neither should be put on the list. Similarly, if A and B are conjointly and in equal shares tenants of a property for which they pay annually, according to the roll, \$20 or \$30, neither should be put on the list. In the former case, to give both the right to vote, the property should be valued at \$400 at least. In the second case, to entitle both to vote, the rent should be at least \$40. But if A and B own together a property valued at \$300, A one-third and B two-thirds, B may vote but not A.—*Ib.*

11. In the following cases complaint may be made to the Council against the list made by the Secretary-Treasurer, or an appeal taken to the Judge from the decision of the Council:—

(1) Under Sect. 33 of the Electoral Act of 1875, which provides that if, on proof, the Council is of opinion that a property has been leased, ceded or transferred solely to give some one a right to vote, it may strike from the list the name of such person, on written complaint to that effect. (2) On facts depriving a person of the right to vote who otherwise would have all the necessary qualifications, when these facts are not apparent on the valuation roll or the voters' list, as when a person on the list is not a subject of Her Majesty, or is afflicted with legal incapacity, as, for example, interdicted for mental alienation, or a felon. (3) If the Secretary-Treasurer has placed on the list a person who is not entitled to vote, under arts. 11, 267 and 270 of the Act, Sect. 14, amended by 39 Vict. c. 13, s. 2. (4) If the Secretary-Treasurer has omitted a person who by the roll is entitled to vote, and not otherwise disqualified, or has inserted the name of a person who by the roll appears not to be qualified. (5) On facts affecting the right to vote, and which do not appear by the roll, as if a tenant does not reside at the place. (Sect. 2. par. 5, Election Act of 1875).—*Ib.*

12. The *curé*, as occupying the *presbytère*, is not an occupant within the meaning of the Election Act.—*Ib.*

13. In an action for the recovery of a fine

under sections 245 and 246 of the Quebec Election Act, it is sufficient to allege and prove the giving of drink or other refreshment by a candidate, to an elector during the election, without alleging or proving the existence of any wrong motive whatever.—*Philibert v. Lacerte*, 3 Q. L. R. 152.

Evidence.—In penal actions instituted under sections 125 and 130 of the Quebec Election Act, the strict rules of law will be applied to the evidence.—*Neault & St. Cyr*, 3 Q. L. R. 147.

2. Secondary evidence of the contents of an insurance policy will not be allowed, where the original policy, though deposited in another district, could have been obtained.—*Reg. v. Bourassa*, 3 Q. L. R. 359.

3. *Parole.*—Although ambiguous terms in a written instrument may be explained by parole evidence of a usage, they cannot be explained by parole evidence of a conversation which took place when the contract was made.—*Connolly v. Provincial Insurance Co.*, 3 Q. L. R. 6.

4. If secondary evidence be adduced without objection, it is presumed that the party who might have objected to such evidence, but failed to do so, has waived his right to urge such objection.—*Thwaites v. Coulthurst*, 3 Q. L. R. 104.

Exception to the form.—Where the writ of summons sets forth only one of plaintiffs three Christian names, and indicates the others by their initial letters, the action will be dismissed on exception to the form.—*Gauthier v. Callaghan*, 3 Q. L. R. 384.

Exchange, Rate of.—The promoters having stated and proved their loss in U. S. currency, the Registrar and merchants reported an equivalent amount in gold, not at the current rate of exchange, but at the rate as on the day of collision. The Court, upon contestation, maintained the report.—*The Frank*, 3 Q. L. R. 193.

Expertise.—Where, in consequence of a deed impeached having been drawn up, and the different parts put together, in an unusual and slovenly manner, doubt arises as to the genuineness of a part of it, an *expertise* may be ordered as to the genuineness of that part of the deed to which such doubt relates.—*Hamel et al. & Panet*, 3 Q. L. R. 174.

Fabrique.—1. Plaintiffs, styling themselves parishioners and freeholders, and seeking to set aside resolutions of the Fabrique for the

purchase of a lot for a cemetery and the payment of money therefor, and demanding that the churchwardens be forbidden to carry out the resolutions at the expense of the Fabrique, were not maintained in their action, which was dismissed on demurrer for want of interest, as well *ratione personae* as *ratione materiae*;—*ratione personae*, because their right of action, if any they had, could be founded only on their quality of fabricians, and Roman Catholic parishioners alone are fabricians. *Ratione materiae*, because parishioners and freeholders, even Roman Catholics, have no personal interest in the moneys of the Fabrique, and consequently they suffer personally no prejudice by the mode in which the moneys are disposed of.—*Carrier v. Les Curé &c. de N.D. de la Victoire*, 3 Q. L. R. 27.

2. The allegation, that the plaintiffs are parishioners and fabricians of a Roman Catholic parish, is not sufficient; it must be alleged that they are Roman Catholics.—*Ib.*

Fraud.—Fraud is not presumed, it must be proved.—*Neault v. St. Cyr*, 3 Q. L. R. 147.

Guardian.—1. The fact that the guardian appointed to a seizure is a minor does not invalidate the seizure, if the effects seized have remained in the possession of the defendant, and if the guardian is voluntary.—*Coté v. Jacob*, 3 Q. L. R. 5.

2. A judicial guardian, refusing to give up the effects seized to the bailiff who is the bearer of the writ of *vend. ex.* is subject to *contrainte par corps* only after being condemned by the Court to give them up within a certain delay, and this rule has been served on him.—*Gauvreau v. Longobardi*, 3 Q. L. R. 195.

Habeas Corpus.—As a general rule, where a minor is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court will permit him to choose as to the custody in which he will be.—*Reg. v. Hail*, 3 Q. L. R. 136.

Semble, the above rule would not apply in the case of a girl under 16, leaving the house of her father, mother or other person having lawful charge of her; nor in the case of a refractory child, under 14, liable to be sent to an Industrial School under 32 Vict. c. 17.—*Ib.*

See Review.

Husband and Wife.—1. Although, under the provisions of the Registry Ordinance, repro-

duced by Art. 1301 C. C., a wife cannot bind herself with or for her husband otherwise than as being common as to property, she may nevertheless legally renounce her hypothecary rights upon the property of her husband in favor of a creditor of her husband.—*Thibaudeau v. Perrault*, 3 Q. L. R. 71.

2. A *propre ameubli* of the wife may, during the community, be effectually hypothecated by the husband; and the wife, even if she have the *clause de reprises* in her favor, and though she may renounce the community, cannot defeat such mortgage.—*Hamel v. Panel*, 3 Q. L. R. 173.

3. A married woman cannot legally renounce, in favor of a creditor of her husband, her hypothecary rights on the property of her husband and of the community; and this notwithstanding the provision of the Registry Ordinance, declaring that "no married woman shall become security or incur any liability, other than as *commune en biens* with her husband, for debts or obligations entered into by her husband before their marriage, or which may be entered into by her husband during their marriage."—*Ib.*

4. The question whether, notwithstanding the Registry Ordinance, a married woman could legally become jointly bound with her husband for the debt of a third person, considered, and observations in the three Courts respecting the case of *Jodoin v. Dufresne*, 3 Q. L. R. 189.—*Ib.*

Immovable by Destination.—The appellant purchased at a bailiff's sale, held under a writ of *fiens facias de bonis*, for taxes, certain moveable effects forming the plant of a brewery, (the proprietor of the brewery not objecting to a sale,) and allowed the same to remain on the brewery premises on storage. The brewery was some months afterwards sold by the sheriff under a writ of *de terris*, the plant being still thereon, and adjudged to the respondent. The appellant gave no notice of his claim to the goods, and filed no opposition to withdraw them, but after the sale to respondent, sought to revendicate them in his hands. *Held*, (dismissing the action) that the effects were immovables by destination, and although the bailiff's sale had under the circumstances passed the property therein to appellant, yet as he had allowed the effects to be virtually included in the sheriff's sale of a brewery, he had only him-

self to blame if an innocent purchaser of the brewery retained all the plant which he found therein, when adjudged to him.—*Budden & Knight*, 3 Q. L. R. 273.

Injunction.—1. The writ of injunction is a civil remedy provided and regulated by the laws of England for the protection of property and the maintenance of civil rights; and the Imperial Statute 14 Geo. III, c. 83, s. 8, having enacted in effect, that in the Province of Quebec "in all matters of property and civil rights resort should be had to the laws of Canada as the rule for the decision of the same," and that all suits respecting such property and civil rights should "be determined agreeably to the said laws and customs of Canada" until changed by subsequent legislation; and the proceeding by injunction not having been established by any subsequent legislation applicable to the said Province, it cannot be allowed as a general remedy, or as a remedy in a case such as the present.—*Carter v. Breakey*, 3 Q. L. R. 113.

2. The powers, of a civil nature, of the Court of King's Bench and of the judges thereof, as created, defined and regulated by the provincial statute 34 Geo. III, c. 6, s. 8, and now vested in the Superior Court, and in the judges thereof, do not include the power of granting writs of injunction.—*Ib.*

3. Although, for the reasons above mentioned, the writ of injunction never has been, and is not now, in the Province of Quebec, a legal remedy except in particular cases provided for by the legislature, yet the prerogative writ of *mandamus*, which is generally used "for public purposes, and to compel the performance of public duties," has, at all times, since the Province became a British colony, been a legal remedy therein, as an incident to the public law of the empire.—*Ib.*

4. The writ of injunction and the writ of *mandamus*, although they may in some cases produce nearly identical effects, are not in principle, nor generally speaking, the same; and, therefore, Art. 1022 C. P., expressly allowing the writ of *mandamus* in certain cases, cannot be considered as tacitly allowing the writ of injunction in the same cases.—*Ib.*

Insolvent Act.—1. It is not necessary that the affidavit under section 9 of the Insolvent Act of 1875 should show that the claim is not secured, provided such affidavit be in the form

prescribed by the Act.—*Barbeau & Larochelle*, 3 Q. L. R. 187.

2. A creditor who has no domicile in the Province of Quebec is not bound to give security for costs in suing out a writ of attachment.—*Reed v. Larochelle*, 3 Q. L. R. 93.

3. The holder of negotiable paper, the maker and endorser of which have both become insolvent, and who has received a dividend from one of them, cannot prove his claim against the estate of the other for the full amount mentioned in the paper—on the contrary he must deduct the amount of dividend received from the estate of the other party. But if, after proof made, dividends are received from the estate of another party, the creditor is, nevertheless, entitled to dividends upon the whole amount proved; provided the dividends do not exceed 100 cents in the dollar on the balance really due.—*In re Rochette*, 3 Q. L. R. 97.

4. One Farmer, a hotel-keeper, being largely indebted to the appellant, a notarial deed of sale, duly registered, was passed between them, whereby Farmer sold to appellant, with right of redemption within three years, certain moveable and immoveable property, comprising the hotel and furniture, being the bulk of his estate, for a certain stated valuable consideration. Farmer remained in possession of the property under lease from appellant, and continued to carry on his business as usual. About ten months afterwards he became bankrupt and the respondent was appointed his assignee. In the meantime appellant had, with Farmer's consent, granted a lease of the moveables to Trihey and Johnson, in whose hands they were when respondent revindicated them as part of Farmer's insolvent estate. Trihey and Johnson did not contest, but the appellant intervened and claimed the effects under the deed of sale above mentioned. The respondent contested the intervention, prayed to have the deed in question annulled and set aside as having been made in fraud of Farmer's creditors. *Held*, that under the circumstances there was no fraud or illegal preference, either within the provisions of the Insolvent Act or of the Civil Code, and that even were fraud disclosed, the Court could not, on such an issue, declare fraudulent and annul that part of the deed affecting the immoveables.—*Bell & Rickaby*, 3 Q. L. R. 243.

5. An insolvent copartnership cannot under the Insolvent Act of 1875 and amending Acts, offer two compositions; one to the creditors of the copartnership, and the other to the creditors of the copartners individually or of any of them.—*Gelinas v. Drew*, 3 Q. L. R. 361.

6. A creditor for an amount under \$500 is without quality to petition against resolutions passed at a meeting of creditors, or against the appointment of an assignee.—*In re Morgan & Sons*, 3 Q. L. R. 376.

Insurance.—1. Where an insurance company, in refusing to pay a loss, did not object particularly to informal notice of loss, *held*, that this was a waiver of their right to a formal or circumstantial notice.—*Garceau v. Niagara Mutual Insurance Co.*, 3 Q. L. R. 337.

2. Where by the terms of a policy of insurance, the statements and representations in the application are made part of the contract, and by the policy all such statements and representations are warranted to be true, false representations and fraudulent suppressions in the application may be urged by the insurer as a cause of nullity in the contract, in an action to have the policy cancelled and delivered up.—*N. Y. Life Ins. Co. v. Parent*, 3 Q. L. R. 163.

3. Where the misrepresentations in the application are to the knowledge of the assured, such nullity may be invoked by the insurer, without any return of premiums paid.—*Ib.*

4. An assignment of the policy can convey no greater rights than the assured himself had.—*Ib.*

Interlocutory Judgment.—The judge who renders the final judgment has power to reverse all interlocutory judgments.—*Archer v. Lortie*, 3 Q. L. R. 159.

Jurisdiction.—1. A District Magistrate's Court, in civil matters, has no jurisdiction over a defendant residing beyond the district wherein the Court sits.—*Ex parte Fiset*, 3 Q. L. R. 102.

2. An action *en déclaration d'hypothèque*, for a sum of \$36, does not fall within the jurisdiction of the non-appealable branch of the Circuit Court.—*Masse v. Coté*, 3 Q. L. R. 322.

Jury.—On a trial for forgery, the panel of petit jurors contained the names of Robert Grant and Robert Crane. The name of Robert Grant was called from the panel, and Robert Grant, as was supposed, went into the box, and was duly sworn as Robert Grant without chal-

lenge. The prisoner was convicted. Before the jury left the box, it was discovered that Robert Crane had by mistake answered to the name of Robert Grant, and that Robert Crane was really the person who served on the jury. On a reserved case, *held*, that there had been a mistrial, and the prisoner should be tried again, (Dorion, C. J., and Sanborn, J., dissenting).—*Reg. v. Feore*, 3 Q. L. R. 219.

Lessor and Lessee.—1. C. purchased an agricultural implement from G., a dealer in such things, with the understanding that it should be removed without delay. Shortly after, C. went for the implement, but snow having fallen and the article being frozen in, it was allowed to remain until spring, when it was seized for rent due by G. *Held*, that under the circumstances the implement was transiently and accidentally on the premises, and not subject to the landlord's privilege. *McGreevy v. Gingras*, 3 Q. L. R. 196.

2. Where, by the lease, the lessee elects domicile at the premises leased, the rent is payable there, and if no demand of payment has been made, prior to suit, at such domicile, the action will be dismissed on defendant showing that he was ready to pay the rent there and bringing the money into Court.—*Hearn v. McGolrick*, 3 Q. L. R. 368.

3. Art. 889 C. C. P. is more extensive than 1641 C. C., and in giving the Court in vacation power to dispose of cases arising from the relation of landlord and tenant, it comprises a special action to cause to cease a trouble for which the lessor is responsible.—*Proc. Gen. pro. Reg. v. Côté*, 3 Q. L. R. 235.

4. A lessor who permits one of his tenants to change the destination of the premises leased, by carrying on therein a trade which renders uninhabitable the premises leased by the same lessor to neighboring tenants, is considered to have sanctioned this change of destination, and his responsibility is the same as if he had specially authorized it by a lease. If the stipulations of the lease are opposed thereto, the landlord alone can invoke them and sue for the faithful performance of them or the cancellation of the lease.—*Ib.*

5. Notwithstanding a clause in the lease stipulating that improvements and additions made by the tenant shall remain for the proprietor, a tenant may take away the double

windows which he put on the house.—*Plamondon v. Lefebvre*, 3 Q. L. R. 288.

Legislatures.—The provincial legislatures have no power to legislate on questions affecting trade, except to raise revenue for provincial purposes.—*Hart v. Corporation of County of Missisquoi*, 3 Q. L. R. 170.

License Act.—The Quebec License Act, 1870, as far as the Insolvent Act of 1869 is concerned, is *ultra vires*. The Insolvent Act of 1869 having for its exclusive object commercial matters, the Provincial Legislature cannot restrain its operation by imposing a duty on the proceeds of sales of insolvent's effects, or by limiting the powers of assignees in the operation of the Act.—*Colé v. Watson*, 3 Q. L. R. 157.

Mandamus.—1. A member of an incorporated building society is not entitled to demand an inspection of the minutes kept by the directors of the association, unless there be a parliamentary direction to that effect, or he shows an interest, or a lawful motive for demanding the inspection.—*Reg. ex rel. Langelier v. Laroché*, 3 Q. L. R. 239.

2. The fact of taking a reasonable time (*e. g.* three days) to consider and take advice before complying with the demand, is not a refusal sufficient to justify a resort to the remedy by mandamus.—*Ib.*

Minor.—See *Habeas Corpus*.

Mistrial.—See *Jury*.

Municipal Corporation.—An indictment will lie against the corporation of a rural municipality for non-repair of a highway, although it is a front road of which each proprietor is bound to repair his frontage.—*Reg. v. Corporation of St. Sauveur*, 3 Q. L. R. 283.

Municipal Matters.—See *Appeal*.

Negligence.—The plaintiff's wife, proceeding over a market place in the city of Quebec, stepped on a plank, forming part of the planking of the market. The plank broke and struck her in the face, inflicting injuries for which the action was brought. It appeared that the clerk in charge walked through the market every day, and no apparent defect existed at the place in question. On examination the plank was found to be decayed underneath. *Held*, that the defect was a latent one, due to the silent, unobserved effect of time, of which the defendants had no notice, and no negligence having

been shown the action could not be maintained.—*Kelly v. Corporation of the City of Quebec*, 3 Q. L. R. 379.

Notice of Deposit.—A party who inscribes in review and makes the required deposit within eight days, is not bound to give notice thereof within the same delay to the adverse party, but may give notice at any time afterwards, the law not determining within what delay that formality is to be observed.—*Lewis v. Lewis & Kennebec R.R. Co.*, 3 Q. L. R. 372.

Nullity of Deed.—A deed attacked as made in fraud of creditors cannot be annulled by the Court on a plea to an opposition, if the conclusions of the plea do not ask that the nullity be declared.—*Blouin v. Langelier*, 3 Q. L. R. 272.

Officer, Public.—A laborer employed on a municipal work is not a public officer entitled to a month's notice, before being sued in damages, by reason of the part which he took in the work.—*Holton v. Atkins*, 3 Q. L. R. 289.

Penal Action.—See *Evidence*; *Election law*, 13.

Peremption.—Peremption cannot be granted in a case where proceedings have been suspended by an inscription *en faux*.—*Anderson v. Sanborn*, 3 Q. L. R. 206.

2. The party obtaining peremption is entitled to costs.—*Germain v. Lacoursière*, 3 Q. L. R. 271.

Pleas, Preliminary.—Since the jurisdiction of the Circuit Court in Quebec and Montreal has been restricted to \$100, no deposit is required with preliminary pleas in that Court.—*Kennedy v. McKinnon*, 3 Q. L. R. 358.

Principal, Foreign.—See *Agent*.

Prescription.—The prescription created by articles 2,260 and 2,267 of the Civil Code being not only a presumption of payment but a *déchéance* against the tardy creditor, and being a presumption *juris* and *de jure* of the extinction of the debt, does not admit of contradictory proof, and cannot be overcome by deferring the *serment décisoire*.—*Fuchs v. Legaré*, 3 Q. L. R., 11

2. But in commercial matters, where the sum in question does not exceed \$50, the oath may be deferred to the party pleading prescription, as to the existence of a verbal promise or acknowledgment, or other interruption or renunciation.—*Ib.*

[To be Continued.]

The Legal News.

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No. 16.

PARTNERSHIP.

Some of the more recent decisions in the United States show that the Courts of the different States still experience considerable difficulty in determining what constitutes a partnership as regards third persons. In *Smith v. Knight*, reported in 71 Ill. 148, A agreed to advance money from time to time to B, up to a certain amount, to enable B to carry on business; and B, on his part, agreed to pay interest on the average balance advanced, and also to divide the profits after deducting a fixed sum for expenses; but A was not to bear any losses. Under these circumstances the Court held that A and B were not partners as to third persons. The Court took an entirely different view in *Leggett v. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244, in which it was held that the test of partnership is the receipt of the gains of the adventure as profits. Then, again, a view somewhat between these rulings was taken in *Harvey v. Childs*, an Ohio case, reported in 28 Ohio, 319, in which the Court expressed itself as follows: "Participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other." In the last mentioned case, the Court did not overlook *Leggett v. Hyde*, but distinguished it on the ground that in that instance there was a continuing trade, from which the authority of the lender might be implied, while in *Harvey v. Childs* it was but one transaction, where no credit was contemplated.

WRITTEN • UNWRITTEN JUDGMENTS.

Our contemporary, the *Albany Law Journal*, a few weeks ago, noted it as something strange that a publication in one of the Pacific States should have commenced to report the unwritten judgments of the Court of Appeal, and remarked that, in the State of New York, re-

porters found quite enough to do in keeping up with the written opinions of the Court of Appeal.

If the reports in the Province of Quebec were to be restricted solely to the written opinions, the number of cases reported, even in the highest Court, would be somewhat limited, for there are judges who seldom put their opinions in writing, even in cases of the greatest importance which are to settle the law on new and intricate points, but who usually content themselves with a verbal explanation of their views. It may be urged, in behalf of this practice, that there are some persons who write with difficulty and constraint, while they have acquired or naturally possess the gift of expressing themselves orally with ease and precision. Were it only the latter who eschewed pen and ink, the practice of delivering an *ex tempore* judgment could readily be excused; but, unfortunately, this is not always the case, and the absence of a written opinion too often marks a hurried examination of the record, the *ex tempore* delivery of the judgment becoming a convenient screen for vagueness of statement.

Seeing that the decisions of the Courts were often *vox et præterea nihil*, the legislature stepped in to require that the recorded judgments should disclose the reasons upon which the Court proceeded. As embodied in the Code of Civil Procedure, Art. 472, the law says that every judgment must mention the cause of action, and in contested cases "it must, moreover, contain a summary statement of the issues of law and of fact raised and decided, the reasons upon which the decision is founded, and the name of the Judge by whom it was rendered."

We are glad to bear our mite of testimony to the fidelity with which many of the recorded judgments conform to this injunction, but that it is often overlooked or neglected is incontestable. Seven years ago, the editors of *La Revue Critique* referred in terms of regret to the failure to comply with the statutory direction. "Combien y a-t-il maintenant d'arrêts de nos Cours qui ne contiennent aucun exposé quelconque des points de droit soulevés? Le nombre en est infini. Tous les jours, des jugements sont portés en appel, sur ce motif simple et commode: 'Considérant que le demandeur n'a pas prouvé les allégations

matérielles de sa déclaration, la Cour déboute, &c.' Et la Cour d'Appel confirme dans les termes suivants: 'Considérant qu'il n'y a pas d'erreur dans le jugement dont est appel, confirme, &c.' Le plaideur ruiné par un semblable jugement, a-t-il au moins la conviction morale que les juges ont parfaitement saisi et compris tous les points de sa cause, qu'ils les ont appréciés et jugés? Nullement, et souvent même il peut en outre se plaindre d'avoir été jugé sur une question qu'il n'avait pas prévue, que son adversaire n'avait pas soulevée, et sur laquelle il n'a jamais eu l'occasion d'être entendu." (Vol. 1, p. 379.)

We believe that the judgments of the present day are not open to the sweeping charge made by *La Revue Critique*. There has been a change for the better and the reports bear witness to the improvement. But a further step in the same direction might probably be taken with advantage.

The pressure of business will no doubt be pleaded as a justification of the omissions complained of. However much force there may be in this it perhaps only proves the charge, because in order to deliver a judgment *ex tempore* in such a manner as to serve as a useful precedent, more time and study would in most cases be required, than would be occupied in reducing the principal reasons to writing. There is a middle course between the voluminous opinion, resembling a treatise in style and length, and the total absence of writing. The Judges who adopt the middle course, and never decide an important case without explaining their reasons in the judgment itself, or in an accompanying note, are undoubtedly doing a work of great advantage to the profession.

THE CIRCUIT COURT.

The business of the Circuit Court, which is superadded to the already laborious duties of the Superior Court judges in Montreal, is no inconsiderable addition to their official work. Mr. Justice Mackay sat in the Circuit Court from the 1st of March to the 21st inclusively, excepting Saturdays and Sundays. He decided two hundred and thirty-three contested cases, supported by evidence parole or documentary. *Ex parte* and default cases amounted to three hundred and seventy-three, but did not entail

labour. The sittings generally took up from 10 a.m. to 4 p.m., with a recess at 1 o'clock of half an hour merely.

QUEBEC DECISIONS.

[Concluded from p. 180.]

Procès-verbal.—A *procès-verbal* can be modified only by another *procès-verbal* made in the same manner, and any alteration which a municipal council may pretend to make in a *procès-verbal* by a simple resolution is absolutely null and without effect, and this nullity may be invoked at any stage of the case.—*Holton & Aikins*, 3 Q. L. R. 289.

Promissory Note.—1. In an action against the maker of a note payable on demand, and generally, want of presentment is not a ground of demurrer. But if the defendant tender the debt and interest before plea filed, and bring the money into Court, the plaintiff will be condemned to pay costs.—*Archer v. Lortie*, 3 Q. L. R. 159.

2. The endorsement of payments on a promissory note is not an interruption of prescription. The limitation of five years operates to extinguish the debt, and nothing less than a new promise in writing can suffice to found an action upon. Any indorsement of interest or part payment of principal should be written by the debtor and signed by both parties.—*Caron v. Cloutier*, 3 Q. L. R. 230.

Repetition.—The action to recover money unduly paid is prescribed only by 30 years, though the exercise of such action involves the previous setting aside of a contract the action for the rescission of which is prescribed by a shorter time.—*Urrutines of Three Rivers v. School Commissioners*, 3 Q. L. R. 323.

Reprise d'instance.—1. The parties to the cause must be put in default to answer the petition *en reprise d'instance* before judgment can be given upon it, i.e., there must be a demand of plea.—*Hamel v. Laliberté*, 3 Q. L. R. 242.

2. A judgment of the Court, declaring the continuance well founded, is requisite, even where no cause is shown against the petition.—*Ib.*

Review.—1. It is competent to a party to inscribe in Review from a judgment rendered on a writ of *habeas corpus* by a Judge in Chambers.—*Reg. v. Hul'*, 3 Q. L. R. 136.

2. No review can be had of a judgment of the

Superior Court concerning a municipal office.—*Piset v. Fournier*, 3 Q. L. R. 334.

Sale.—1. N. being indebted to P. in the sum of \$1300, offered as security a mortgage on three pieces of land, and a deed was accordingly executed; but it being afterwards found that N. could not legally hypothecate one of the three lots, a deed of sale was passed by which he conveyed said lot to P. for the expressed price of \$400, with the verbal understanding that as soon as the whole amount due was paid to P. he would reconvey to N. the lot in question. Two months afterwards N. became insolvent and fled the country. The two lots mortgaged, having been brought to sale, realized some \$900 for P., who claimed to retain the third lot for the balance due him, whereupon H., a judgment creditor (while admitting the validity of the mortgages), attacked the deed of sale as simulated and fraudulent, and contested P.'s right to prevent a judicial sale of said piece of land. *Held*, that the deed was void for total want of consideration, and the land never having passed under it, could be brought to sale as still forming part of N.'s estate.—*Pacaud v. Huston*, 3 Q. L. R. 214.

Sale, Resolution of.—Under the custom of Paris, the transferee pure and simple of a *prix de vente*, without other stipulation, might bring action *en résolution de vente* for default, either total or partial, of payment of price. The demand *en résolution* might also be made for default of payment of a constituted rent, price of an immoveable—even by the vendor who had sued for payment of price.—*St. Cyr v. Millette*, 3 Q. L. R. 369.

School Tax.—The school tax is not an annual rent and is not subject to the same prescription as annual rents.—*Ursulines of T. R. v. School Commissioners of Riviere du Loup*, 3 Q. L. R. 323.

Seamen's Wages.—Where, after a collision, the vessel injured was docked for the winter, and her voyage could not be resumed until spring, by reason of navigation of the St. Lawrence being closed until then, *held*, that her owners could not recover as part of their damages the seamen's wages while idle during the winter, and not more than would suffice to send them to the place where they were shipped, and to pay their wages until their arrival there.—*The Normanton*, 3 Q. L. R. 303.

Seignior.—1. Since the Seigniorial Act of

1854, the Seigniors are no longer bound to pay to the school Commissioners, the fortieth required by C. S. L. C. c. 15, s. 77, and a Seignior who had unduly paid this tax was allowed to recover the amount, even from the successors of the Commissioners to whom he paid it.—*Ursulines of Three Rivers v. School Commissioners of Riviere du Loup*, 3 Q. L. R. 323.

2. Before 1854, when a Seignior became proprietor of land in his seignior, whether by purchase, succession, exchange, or other title, such land became reunited to the domain.—*Pouliot v. Fraser*, 3 Q. L. R. 349.

3. But in the case of a Seignior *grevé de substitution*, this reunion was only temporary, and ceased at the opening of the substitution.—*Ib.*

Sheriff's Sale.—See *Adjudicataire*.

Subrogation.—Subrogation cannot be allowed under Art. 1156 C. C., unless it appears that the person who claims the subrogation paid the debt in relation to which he claims such subrogation.—*Chinic v. Canada Steel Co.*, 3 Q. L. R. 1.

Substitution.—The *grévés de substitution* are proprietors. They cannot bind the *appelés*, but they can alienate, and their acts of alienation are valid so long as the substitution is not open.—*Pouliot v. Fraser*, 3 Q. L. R. 349.

Temperance Act.—The first ten sections of 27 and 28 Vict. c. 18 (Temperance Act of 1864) have not been repealed by Art. 1086 of the Municipal Code.—*Hart v. Corporation of County of Missisquoi*, 3 Q. L. R. 170.

Undue Influence.—See *Election Law*.

Wager.—See *Bet*.

Water Course.—The recourse given by c. 51 C. S. L. C. is not exclusive, and the direct action before a competent Court is not taken away by this statute.—*Emond v. Gauthier*, 3 Q. L. R. 360.

Windows.—A proprietor cannot complain of windows in his neighbor's buildings at a distance prohibited by law, if his own buildings prevent the windows from overlooking his premises.—*Touchette v. Roy*, 3 Q. L. R. 260.

CURRENT EVENTS.

GREAT BRITAIN.

COMMON EMPLOYMENT.—No better exemplification of the length to which the doctrine of "common employment" has been permitted to go could be found than the case of *Swainson v.*

North-Eastern Railway Company, which was decided by the English Court of Appeal in the latter part of February. The plaintiff was the widow of a signalman porter in the service of the Great Northern Company, who was killed in the Leeds station by the negligence of an engine driver of the North-Eastern Company. The Leeds station is occupied by both companies under an agreement, and the expenses of that station are jointly defrayed by both companies. Amongst these expenses came the wages of the deceased signalman, and upon this ground it was argued that the Great Northern signalman was a *collaborateur* with the North-Eastern engine driver, whose negligence caused his death. The court below yielded to this argument, but it is not surprising to find that the Court of Appeal has unanimously reversed the decision of the Court below, and given judgment for the plaintiff. If the decision for the company had been allowed to stand, the *collaborateurs* which the law would have created might have been counted by thousands, for there are few large railway stations which are not occupied and paid for by more companies than one.

FRANCE.

The lawyers of Lyons, having become dissatisfied with M. Lagrevol, an appeal Judge, have unanimously resolved not to plead before him until he shall publicly apologize for his conduct towards them.

UNITED STATES.

SHALL WOMEN BE ADMITTED TO THE BAR?—The following is the brief presented by Mrs. Lockwood in support of the bill pending in Congress to allow women to practice law in the Federal Courts:

To the Honorable the Senate of the United States:

IN SUPPORT OF HOUSE BILL NO. 1077, ENTITLED, "A BILL TO RELIEVE CERTAIN DISABILITIES OF WOMEN."

The provisions of this bill are so stringent that, to the ordinary mind, it would seem that the conditions are hard enough for the applicant to have well earned the honour of the preferment, without making *sex* a disability.

The Fourteenth Amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

To deny the right asked to be granted in this bill, would be to deny to your relator and other women citizens the rights guaranteed in the Declaration of Independence to be self-evident and inalienable, "life, liberty, and the pursuit of happiness," a denial of one of the fundamental rights and privileges of citizenship; "the denial of the right of a portion of the citizens of the commonwealth to acquire property in the most honorable profession of the law, thereby perpetuating an invidious distinction between male and female citizens equally amenable to the law;" and having an equal interest in all of the institutions created and perpetuated by this Government.

The Articles of Confederation declare that "The free inhabitants of each of these States (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all privileges and immunities of free citizens in the several States."

Article 4th of the Constitution says: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"

Illinois, Michigan, Minnesota, Missouri, North Carolina, Wyoming, Utah, and the District of Columbia admit women to the bar. What then? Shall the second co-ordinate branch of the Government, "the Judiciary," refuse to grant what it will not permit the States to deny, the privileges and immunities of citizens, and say to these women attorneys, when they have followed their cases through the State courts to that high tribunal beyond which there is no appeal, "you cannot come in here, we are too holy;" or, in the words of the learned Chancellor, declare that "By the uniform practice of the Court, from its organization to the present time, and by a fair construction of its rules, none but men are admitted to practice before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period, and the

Court does not feel called upon to make a change until such a change is required by statute, or a more extended practice in the highest courts of the State." With all due respect for this opinion, we beg leave to quote the rule for admission to the bar of that court as laid down in the Rule Book :

" RULE No. 2.—Attorneys.

" It shall be requisite to the admission of attorneys or counsellors, to practice in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair."

There is nothing in this rule, or in the oath which follows it, either express or implied, which confines the membership of the Bar of the U. S. Supreme Court to the male sex. Had any such term been included therein it would virtually be nullified by the 1st paragraph of the United States Revised Statutes, ratified by the 43rd Congress, December 1, 1873, in which occur the following words: " In determining the meaning of the Revised Statutes, or of any act or resolution of Congress passed subsequent to February 25, 1871, words importing the singular number may extend and be applied to several persons or things; words importing the masculine gender may be applied to *females*," etc., etc.

Now as to "immemorial usage in England." The Executive branch of that government has been vested in an honored and honourable woman for the past 40 years. Now is it to be supposed that if this distinguished lady, or any one of her accomplished daughters, should ask to be heard at the Bar of the Court of the Queen's Bench, that Court, the practice of which the United States Supreme Court has set up as its model, that she would be refused?

Blackstone recounts that Ann, Countess of Pembroke, held the office of Sheriff of Westmoreland, and exercised its duties in person. At the assizes at Appleby she sat with the judges on the bench. See Coke on Lit., p. 326. The Scotch sheriff is properly a judge, and by the statute 20 Geo II., c. 43, he must be a lawyer of three years' standing.

Eleanor, Queen of Henry Third of England, in the year 1253, was appointed Lady Keeper of the Great Seal, or the Supreme Chancellor

of England, and sat in the Aula Regia or King's Court. She in turn appointed Kilkenny, Archdeacon of Coventry, as the sealer of writs and common law instruments, but the more important matters she executed in person.

Queen Elizabeth held the Great Seal at three several times during her remarkable reign. After the death of Lord Keeper Bacon she presided for two months in the Aula Regia.

It is claimed that "admission to the bar constitutes an office." Every woman post mistress, pension agent, and notary public throughout the land is a bonded officer of the Government. The Western States have appointed women as school superintendents, enrolling and engrossing clerks for their several Legislatures and State Librarians.

Of what use are our seminaries and colleges for women if after they have passed through the curriculum of the schools there is for them no preferment, and no emolument; no application of the knowledge of the arts and sciences acquired, and no recognition of the excellence attained.

But this country, now in the second year of the second century of her history, is no longer in her leading strings, that she should look to Mother England for a precedent to do justice to the daughters of the land. She had to make a precedent when the first male lawyer was admitted to the bar of the United States Supreme Court.

Ah! this country is one that has not hesitated when the necessity has arisen to make precedents and write them in blood. There was no precedent for this free Republican Government and the war of the Revolution; no precedent for the war of the Rebellion; no precedent for the emancipation of the slave; no precedent for the labor strikers of last summer. The more extended practice, and the more extended public opinion referred to by the learned Chancellor has already been accomplished. Ah! that very opinion telegraphed throughout the land by the "associated press" brought back the response of the people as on the wings of the wind by that same press, asking you for that special act now so nearly consummated, which shall open this door of labor to women.

BELLA A. LOCKWOOD,
Attorney and Solicitor.

WASHINGTON, D. C., March 7, 1878.

EXCLUSIVE TELEGRAPHIC PRIVILEGES A REGULATION OF COMMERCE.—On Monday the Supreme Court of the United States, by Chief Justice Waite, filed an opinion, from which Field and Hunt, JJ., dissent, holding that the granting by a State to a company exclusive telegraphic privileges is a regulation of commerce within the meaning of the Federal Constitution; that the telegraph has become indispensable to the business of the world, both as to private persons and Governments, and that it cannot be thus limited or restricted by State law. This is an opinion of the greatest importance, as it virtually takes all power from the States to regulate telegraphs or telegraph companies, a power which they have exercised ever since there was a telegraph. We are not prepared to say the opinion is not right; in fact we think it is. Are not railroads "indispensable to the business of the world, both as to private persons and Governments," and if so, can a State give a railroad company any exclusive privileges?—*Chicago Legal News*.

THE U. S. BANKRUPT ACT.—The Senate committee on judiciary have reported, without recommendation, a bill to repeal the bankrupt law. The views of the members of the committee were not at all harmonious, but a majority directed the report made, and several who did not favor repeal consented that the bill should be reported without recommendation. If the feeling of the committee is an index of that of the Senate the passage of the bill by that body seems certain. The House is sure to take like action on the matter, and the only hope of those interested in a perpetuation of the law is in delaying action in one or the other of the two houses. We sincerely hope that they may not be able to do so, for the great majority of the people, both business men and lawyers, have become convinced that the bankrupt law is productive of much more harm than good, not only to business interests but to those of the legal profession. In one or two instances the courts have severely admonished the opportunities for fraud it affords. *Matter of Allen*, 17 Alb. L. J. 170. In various ways it operates to injure the community, and even its friends admit that essential amendments are needed if it should remain in force. No two persons agree as to what amendments should be made, and the

only solution of the difficulty is that proposed by the Senate committee, namely, unconditional repeal.—*Albany Law Journal*.

CAPITAL PUNISHMENT IN IOWA.—The State of Iowa, after an experience of several years under legislation not permitting capital punishment for murder, has restored the death penalty. This State is very favorably situated for testing whether it is better for the community to inflict death as a penalty for murder, having an agricultural community with fertile lands, and with no large centres of population so as to develop what is known in our great cities as the criminal class. If an experiment of this kind ought to succeed anywhere it is in Iowa, but we judge that it has not from the circumstance that the change mentioned has been made.—*Id.*

VANDERBILT'S WILL.—The Vanderbilt will case, which has for some months occupied most of the spare time of the surrogate of New York, has been productive at length of an opinion from that official, wherein the question whether the declarations or admissions of a legatee under the will tending to show undue influence, or the absence of testamentary capacity are admissible in evidence in behalf of the contestants, is elaborately and learnedly discussed. Numerous authorities, American and English, are examined, and the conclusion reached that the declarations and admissions should be excluded.—*Id.*

PROPERTY IN A CORPSE.—The case of *Guthrie v. Weaver*, 1 Mo. App. Rep. 136, was an action of replevin to obtain what was described to be a coffin of the value of \$90, with its contents. The contents were the dead body of plaintiff's wife, who was the daughter of defendant. The body had, with the consent of plaintiff, who had paid for the coffin containing it, been buried in a cemetery lot belonging to defendant. Thereafter plaintiff demanded a delivery of the coffin and body to him that he might reinter them, and this being refused, he brought this action. The court held that there is no property in a corpse, that the relatives have only the right of interment; that this right in the case at bar, having been exercised by burial in the father's lot, with the consent of the husband, no right to the corpse remained except to protect it from insult. The doctrine that there is no absolute property in a dead body has been asserted in

several cases. *Wynkoop v. Wynkoop*, 42 Penn. St. 293; *Pierce v. Proprietors of Swan Pt. Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; *Kemp v. Wickes*, 3 Phillim. 264. By the old English law the charge of the body belonged exclusively to the ecclesiastical courts. The only common law remedy for a wrongful removal was by criminal process. In *Rez v. Sharpe*, Dears. & B. 160, an indictment against a man for removing his mother's body from one graveyard for the purpose of burying it in another, was sustained. But under the old English law it was the practice to arrest and detain dead bodies for debt. In several States, Rhode Island, Massachusetts, etc., there are statutes forbidding this. For an interesting discussion of the subject, see *Pierce v. Proprietors, etc.*, *supra*, and notes, 14 Am. Rep. 676, 678.

NEWSPAPER CENSURE, WHEN PRIVILEGED.—In the case of *Gott v. Pulsifer*, 122 Mass. 235, plaintiff brought action for an alleged false and malicious libel published concerning the image known as the "Cardiff Giant," in defendants' newspaper. The image belonged at the time to plaintiff, and he had made a contract with one Palmer to sell it to him for \$30,000. Defendants' newspaper in a humorous article charged that the "giant" was a humbug, and that it had been sold in New Orleans for the sum of eight dollars. In consequence of the appearance of this article the sale to Palmer was not made. The jury found for defendants. The Supreme Court sustained certain exceptions taken by the plaintiff and gave a new trial, saying, however, that "the editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice." See, as supporting this rule, *Dibden v. Swan*, 1 Esp. Cas. 28, where Lord Kenyon charged that the editor of a newspaper may fairly and candidly comment on any place or species of public entertainment, and that if done fairly and without malice or view to injure the proprietor, however severe the censure, the justice of it screens the editor from legal animadversion. See also *Carr v. Hood*, 1 Campb. 355;

Hemwood v. Harrison, L. R. 7 C. P. 606; *Fry v. Bennett*, 28 N. Y. 324; *Gregory v. Duke of Brunswick*, 6 M. & G. 953.—*Id.*

AGENCY—A SUMMARY OF RECENT DECISIONS.

[Wm. Evans, in *Law Times*, London.]

First, as to the authority of joint principal and joint agents:

Each of several co-owners of a thing can only sell or authorize the sale of his own interest in that thing; but all the co-owners may combine to sell or authorize the sale of the whole thing. There is, again, nothing which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property. Whether they have done so or not, depends upon the circumstances of the particular case: *Keay v. Fenwick*, 1 C. P. Div., 745.

The mere taking of a bill from one of several joint owners of a ship, who is also the ship's husband, is no legal release of the liability of his co-owners.

In an action for commission, brought by shipping agents against all the co-owners of a ship, with the exception of one, D, the ship's husband, the mere fact that the plaintiffs, knowing that the defendants were co-owners of a ship with D, took a bill from him for the amount due to them, and proved against his estate in respect of such bill, is not sufficient to discharge the defendants: *Bottemley v. Nuttall*, 5 C. B. N. S., 122; 28 L. J., 110, C. P.; *Keay v. Fenwick*, 1 C. P. Div., 745.

An unauthorized order to sell, given by one joint owner, is ratified by the other joint owners joining in a power of attorney, enabling their agents to convey their respective shares: *Keay v. Fenwick*, 1 C. P. Div., 745.

Secondly, as to the existence of implied authority to bind the principal:

With respect to the evidence of an agent's authority to sell goods in his own name, it has been decided that the fact that a principal has intrusted an agent with the possession of goods for the purpose of selling them is, as between the agent and third parties buying the goods, *prima facie* evidence that the agent is authorized to sell them in his own name. Hence, if the court is satisfied that no limitation of the

agent's authority was disclosed to the buyer, a set-off of a debt due from the agent is a good defence to a claim by the principal against the buyer, notwithstanding that the agent, though so intrusted with the goods, was under an agreement with his principal not to sell in his own name: *Ex parte Dixon*; *Re Henley*, L. Rep. 4 Ch. Div., 133; 46 L. J. 20, Bank.; 35 L. T. Rep. N. S., 644.

Lord Justice Brett explained, in a subsequent case, that the statement by Mr. Justice Willes, in *Semonza v. Brimley*, 18 C. B. N. S., 467, to the effect that it must be shown that the agent acted with the authority of his principal, was due to the fact that he was dealing with the demurrer; and that such authority is shown when the facts prove that he is intrusted as a factor: *Ex parte Dixon*; *Re Henley*, 4 Ch. Div., 133.

An agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, has implied authority to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo: *Hingston v. Wendt*, 1 Q. B. Div., 367.

An auctioneer has a possession coupled with an interest in goods which he is employed to sell; not a bare custody, like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room. The auctioneer has also a special property in such goods, with a lien for the charges of sale, commission and the auction duty: *Williams v. Millington*, 1 H. Bl., 81, 84, 85. The catalogue and conditions may afford evidence that he has contracted personally, and so be liable for the non-delivery of goods and the like: *Woolfe v. Horne*, 2 Q. B. Div., 355. The authorities are conclusive to show that a broker acting for one of the contracting parties making a contract for the other, is not authorized by both to bind both; but the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract, and the signed entry in the broker's book is a sufficient memorandum of the bargain to satisfy the Statute of Frauds: *Thomson v. Gardiner*, 1 C. P. Div., 777.

A broker who acted for the plaintiff, made a contract for the sale of goods to the defendant. He sent a note to each party, but signed only

that which was sent to the seller. The contract was entered in the book and duly signed. The defendant kept the note which was sent to him, and made no objection until called upon to accept the goods. The court held that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him: *Thomson v. Gardiner*, 1 C. P. Div., 777.

Thirdly, as to questions of ratification:

In order to amount to a ratification after attaining a full age, within 9 Geo. 4, c. 14, s. 5, Chief Justice Cockburn states the rule that "there must be a recognition by the debtor, after he has attained his majority, of the debt as a debt binding upon him." *Rowe v. Hopwood*, L. Rep. 4 Q. B., 1. A recognition when of full age, and a promise to pay it "as a debt of honor," when of ability, is not such a ratification: *Maccord v. Osborne*, 1 C. P. Div., 568. By ratification is meant an admission that the party is liable and bound to pay the debt: *Per Parke, B., Mawson v. Blane*, 23 L. J., 342 Ex.; 10 Ex. 206-210.

When a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of the thing insured by the party on whose behalf it is made, though he knew of the loss at the time of the ratification: *Williams v. North China Insurance Company*, 1 C. P. Div., 757. The justice as well as the authority of this principle was insisted upon by the Court of Appeal, in a case decided in 1876, where Chief Justice Cockburn pointed out that, where an agent effects an insurance subject to ratification the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected, involves that possibility of the contract: *Ib.*

A set-off cannot be maintained of a debt contracted by the plaintiff during infancy, and not ratified by him in writing after full age: *Rawley v. Rawley* 1 Q. B. Div., 460.

Fourthly, as to the agent's right to commission:

In considering whether an agent is entitled to commission for the introduction of a purchaser or capital, the question is whether the purchase or advance was the result of that introduction, or of an independent negotiation between the parties. *Causa proxima* is not the

question; the agent must show that some act of his was the *causa causans*. In *Tribe v. Taylor*, 1 C. P. Div., 505, the defendants agreed to give the plaintiffs a commission of five per cent. on purchase money, or on capital introduced into his business. They introduced a person who advanced £10,000, and who in the course of a few months entered into an agreement of partnership on making a further advance of £4,000 by way of capital to the concern. Commission on the former sum was duly paid; but the court held, in an action to recover commission on the £4,000, that the plaintiffs could not recover, inasmuch as the latter was not made in consequence of their negotiations. Where, however, A employs B to sell a ship, and agrees that if a sale is effected to any person "led to make such offer in consequence of" B's mention or publication of it, B should be paid a commission, the Common Pleas Division held that B was entitled to his commission although the purchaser was led to purchase merely from hearing of B's publication: *Bayley v. Chadwick*, 36 L. T. Rep. N. S., 740.

Fifthly, as to questions relating to the scope of the agent's employment:

The cases which have arisen upon this subject, it has been said, have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever varying facts and circumstances which present themselves. There is, however, no doubt as to the true principle which ought to guide us. It was laid down in Lord Holt's time, and repeatedly since, that whenever a master intrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing entrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment: *Rayner v. Mitchell*, 2 C. P. Div., 360, per Lord Coleridge. Hence the court held that a carman was not acting within the scope of his authority when, without his master's permission, and for a purpose of his own,

wholly unconnected with his master's business, he took out his master's horse and cart and injured a cab: *Ib*.

Sixthly, as to the position or status of branch banks:

Branch banks are agencies of the principal banking corporation or firm; the branches and the firm are identical. In *Prince v. Oriental Bank Corporation*, 38 L. T. Rep. N. S., 41, a promissory note, payable at a branch bank, became due, and the manager cancelled it as paid, remitting to the principal bank a draft for the amount in favour of the bankers of the payees. The note, however, had not been paid, but was dishonoured. The next day the manager of the branch bank wrote to the manager of the principal bank, requesting him to cancel the draft. The dishonoured note was returned, indorsed "Cancelled in error." Neither the payees nor their bankers were informed that the note had been paid. The privy council had applied the above rule, and, affirming the judgment of the court below, held that the payees could not maintain an action for money had and received against the principal bank.

THE TOOLS OF THE LEGAL TRADE, AND HOW TO CHOOSE THEM.

By JOEL P. BISHOP.

Few men, in any trade, can do good work without good tools: and none, without such tools, can do their good work rapidly.

The books in a lawyer's library are, for the most part, his tools. Now and then, perhaps a mere speculative treatise, upon the law or some branch of it, may be found covered with dust, upon an upper shelf; but in general our American lawyers avoid all such as they would poison. Nor, though the prejudice against this class of books may be carried too far, is it altogether mistaken. In the opinions of judges, delivered in actual causes before them, and in the treatises of authors expounding the law for practical use, more or less of what would be deemed mere speculation, if it stood by itself will necessarily appear. For example, Lord Chief Baron Abinger, in delivering an opinion, once said: "It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so, we are at liberty to look at the conse-

quences of a decision the one way or the other."² He then went on to produce speculations, as some would term them, out of which the determination of the court was evolved. And, in our books of reports, many such cases occur. So, a law-treatise, if truly practical, will present its topic in such a way that the reader will see the reasons—the speculations—on which the law proceeds, though it may have no special sections on how it should be; not only because the legal reasons are the law, likewise because, otherwise, the reader could not be aided in forming his judgment as to how a new question would probably be decided. In these fountains, therefore, the practitioner has the speculations, all the more valuable for being in a practical form. And he would not seem to be in particular need of others. The defects in the law, and the methods of curing them, may not there be shown; but this is a sort of speculation not specially within the jurisdiction of a practising lawyer, or of the court to which he applies for the enforcement of his views, but it is for the legislator. The practitioner, therefore, has little more occasion for this class of books, however meritorious and useful, than for treatises on the calculus and on mental science.

There are, however, some books—and there ought to be more—of a highly practical sort, not within the scope of this article. As illustrative, I will mention Reed's "Practical Suggestions," published some three years ago. In this book an able lawyer, who had made the conduct of lawsuits a special study, and had risen to be a leader at the bar, especially in the trial of causes, gives to his younger and less successful brethren the results of his investigation and experience in the "Management of Lawsuits and Conduct of Litigation, both in and out of Court." This is a book to be read and studied by every lawyer, especially of the junior class. It is in the highest degree practical, yet it is not a tool of the trade. It is rather a sharpener of tools, and an instructor in their use. And there are other books of the highest practical value which are not tools. This article is of the practical sort, but it is not a tool.

Let us consider, then, the tools of the legal trade.

And, for the first step, we must form an accurate idea of the thing to be done with them; because, always, a tool must be adapted to the particular work. An awl is excellent in making a shoe; but, heat it as we will, it will not draw a train of cars.

A lawyer in his office is approached by a client for advice. What the client wants is to be informed how, on the presentation of given facts to the court having jurisdiction over them, or of known testimony to the court and jury, the tribunal will decide the case. This is always the precise thing sought—what *will be*, not what has been. I do not forget that we look to the past in judging of the future; just as a sea-captain, in considering whether to reef, thinks of the signs which the past has shown as indicating an approaching gale. But what he is anxious to learn is, not whether there was a gale yesterday, but whether one is coming now. And no lawyer in his practice has ever occasion to know what has been held as law heretofore, except as evidence of what may be held hereafter. If, instead of advising a client, one is acting as conveyancer, or as the draughtsman of an ordinary contract, his ultimate thought relates to what the courts may hereafter hold of the instrument should it come into litigation, and he looks to what has been only as indicating what will be.

But, in the law, as in other things, there is constant progress, and there are changes. Events will appear which never, even in form, transpired before, and out of the new events new questions will arise. And, where the past approaches nearest to repeating itself, the likeness of to-day to yesterday is not perfect, rendering it uncertain whether the seemingly old question of to-day should be decided in the same way as before. Moreover, in correcting the errors of the past, the courts sometimes overrule their former decisions. Hence the results to which the courts have already arrived constitute only a part of what the lawyer has to understand and explain; there is another and much more difficult part beyond. And his tools must be adapted to the accomplishment of both, and he must know how to use the tools, else he will wrong his clients and the courts, and fail of acquiring the due rewards of the profession for himself. This is so in all departments of the profession; there is no ex-

² Priestley v. Fowler, 3 M. & W. 1, 5.

ception. It is just as important to determine—and correctly—whether a court can be brought to overrule an adverse decision, as to find the decision itself; just as essential to judge truly in advance how a new question will be decided, as how an old one has been; just as essential to ascertain whether one seemingly old is really such, as how the admitted old should be decided now.

It is idle to say that the lawyer needs tools to do the easy part of the work, but the difficult part may be done without tools. A babe feels itself competent, even without a ladder, to grasp and handle the moon; and there are plenty of babes in the law who do not doubt that, if they are helped to ascertain what has been decided heretofore, they can manage the rest by their own unaided brains—tools, for high achievements, they despise; they would like help in walking but they can soar alone. I am not writing for such; but for those who know that, of all earthly aid which a mortal may crave, the most helpful is the simple suggestion of the thing which, when suggested, is absolutely plain and obvious. The want of the simple suggestion is what, for ages, deprived the world of the steam-engine, the railroad track, the telegraph, the sewing-machine, and the thousand of other inventions which distinguish the present times from those of old. And there is no department of thought in which the simple suggestion is more important than in the law. Most of what, in the United States, passes for, and is referred to, as authority, is not truly such. The English decisions since the Revolution, and those of states other than our own, have no binding force with us; yet they are listened to by the courts with respect, and, if they are uniform, and the reasoning of the judges in them appears sound, they will almost always be followed. Hence the practitioner must know how to find them, how to estimate their value, and how to reason from them; and must have tools for doing this work. If a case of this class is against him, he must be able to detect fallacies in it, and to convince the court that those which he points out are fallacies in truth.

Let us see, then, what we have as practically essential. First, the lawyer must be able to find, and have the tools for finding, every case, English or American, ancient or modern, which

will have any bearing on whatever question may possibly arise. This will not include every case in the books; because a doctrine once held may have been overruled, or superseded by legislation, or varied or enlarged by later decisions; or, otherwise, a case may be no longer of practical avail. I said, "able to find;" but an actual finding, or especially an actual using, will not always be necessary. In most circumstances a limited number will suffice; but in some all should be examined, and in rare instances the whole should be actually produced in court. Secondly, the legal doctrine on which the cases proceed must be understood, else their application to the question in hand cannot be made. The doctrine is not always expressed in the cases which really proceeded upon it, or in any other book; but not unfrequently, though not as the general rule, the practitioner will be compelled to search it out by the light only of his own unaided understanding, and satisfy the judge of its correctness by showing how it harmonises and explains the cases, and accords with the other doctrines, and with the spirit, of the law. The more fully and accurately the doctrine of the law appears in any book, the better is it as a tool. Thirdly, where the question is new, or has been decided only in England or some other State—a class which is believed to embrace more than half the cases argued and adjudged in our State courts, indeed, almost the whole in our younger states—the practitioner must be able to go to the very "bottom of things," and make the whys and wherefores tell in every sentence he utters. To cite merely, in an unreasoning manner, the dry conclusions of law arrived at elsewhere, is to betray the cause of the client. Fourthly, he must, as already said, be able to discern when there is a reasonable prospect of getting a prior decision of his own court overruled; to which end he must know the limits of the doctrine of *stare decisis*, and the reasons which fix each particular limit. Whether he attacks the former decision or defends it, he must be absolutely "at home" in this whole learning. To do this requires, especially, a knowledge of the doctrines of the law as distinguished from the cases.

I have thus far assumed that the law is, what it is generally understood to be, a system of

doctrines, which are evidenced by the decisions, and not the decisions themselves. Lord Mansfield expressed the idea thus: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases."* And Tucker, P., in the Virginia Court: "Though we search for precedents, to discover and illustrate principles, the law depends at last upon principles, and not upon the precedent."† This is the view of the law entertained by every successful practitioner. But there are lawyers who deem it erroneous. According to them it is not *law* at all; it is a conglomeration of adjudged cases, by analogies to which succeeding cases are to be decided. These lawyers may be likened to one who should believe it not to be a law that material substances above and upon the earth gravitate towards its centre, and who should spend his days and nights in collecting, and burden his memory with remembering, particular instances in analogy to which he would hope, but not be sure, material things would move hereafter; enquiring specially for those instances in which new-made cheese had dropped to the moon, and leaden bullets had fallen upwards from pavements and killed wild geese flying for more congenial climes. Now, this view of the law may be correct—at least, the present article does not deny it—but those who entertain it have no occasion for tools of the legal trade, because they have nothing to do with which to employ the tools. They may, indeed, so long as no revolution in professional thought occurs, get some work at making digests, or instructing young candidates for honors at the bar, because herein their labours are brought to no practical test by which they can be shown to be abortive. But, assuming their views to be correct, still they cannot advise a client correctly, or manage well his cause in court; and the reason is that though, as we assume, their views are just, yet, to practice from them, they must know the facts and results of the many hundred thousand cases from which the analogies are to be taken, as the only possible means by which to find the particular case required. Then, should they find the right case and produce it to the judge, they, holding it to be in itself supreme, and rejecting the idea that it is a mere manifestation of a law

which exists separate from itself, would have no power of satisfying the court of its application to facts differing in any degree from those involved in it. Nor would there be any fulcrum on which to rest a lever for upsetting a case which had been wrongly decided. Indeed, it could not be said that any decision had been wrong. Again, no lifetime would be sufficient to read the cases; and, supposing them to be read and remembered, no powers could keep pace with the constantly accumulating mass. If a man enters upon this line of study and practice, he is soon overburdened, and his brain becomes broken by the mass piled upon it; he is bewildered, and he loses all capacity to do anything well. Holding, as we assume, to the truth, he becomes a martyr in the cause of truth, but the emoluments of a successful practice can never be his. His home is in Heaven, with the martyrs who have gone before, and the sooner he arrives there the better for him.

[To be Continued.]

PERILS OF JUDGES.—The narrow escape of the Master of the Rolls from assassination, by a gentleman whom there is too much reason to believe is irresponsible, revives the recollection of the less deadly attack upon Vice-Chancellor Malins some time ago. Not to quote instances far back in legal history, there have been occasions within the last twenty-five years when the perils of judicial administration have been brought before the public. A prisoner at an assize on the Northern Circuit, on receiving sentence, stooped down and took off his heavily nailed boot, which he hurled at the head of Mr. Justice Cresswell. That stern but eminently just judge for a moment appeared to quail, but in the next instant recovered, and quietly directed the prisoner to be removed. Sir Samuel Martin and Mr. Justice Hawkins have both appeared in inferior courts to obtain protection against persons who had threatened them. The circumstances of the attack upon Sir George Jessel are nearly parallel with that upon the present Solicitor-General when he was Mr. Giffard. At the Old Bailey, about twenty years ago, Mr. Giffard was performing his duty as counsel, when a poor mad gentleman came up to him, and saying, "Remember Cardiff," fired upon him, happily without injury to one destined to take one of the first places at the Bar. It is impossible to guard against any such attacks when they are made by madmen; and, unhappily, the mental worry of litigation is only too surely calculated to develop any incipient or latent tendency to lunacy. The public will rejoice that the most capable, and certainly the most industrious judge we have on the bench has escaped the attack of an assassin. Sir George Jessel does not spare himself, and the example he sets is beyond all price to the public at large.—*Echo*.

* *Rex v. Bembridge*, 3 Doug. 327, 332.

† *Williamson v. Beckham*, 8 Leigh, 20, 24.

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JUDICIAL SALARIES.

The Judges of Canada are as ill-paid a class of officials as it is possible to find anywhere, when the nature of the duties imposed upon them is taken into consideration. In the Province of Quebec it would be a great boon to the community if we could readjust the judicial machinery so as to dispense with some of the Judges, and give those actually required a better remuneration. It is not uncommon to hear a lament over the lack of great men on the bench, but it may fairly be asked whether one of the first preliminaries to securing talent—an adequate remuneration—has been attended to. Thus far, with the exception of the newly constituted Supreme Court, the salaries paid to the Judges of the superior tribunals are no larger than pertain to many simply clerical positions in England. The list of officers quoted below shows that in England not only are subordinate officials enjoying ample salaries, but the Judges are not unmindful of the welfare of their relatives. The list is as follows, the amounts being in pounds sterling: Secretary of Presentations, the Hon. E. P. Thesiger, £400; Secretary of Commissions, Mr. W. M. Cairns, £300; Secretary of Causes, Mr. J. Romilly, £1,000; Clerk of Records and Writs, the Hon. E. Romilly, £1,200; Registrar in Lunacy, Mr. C. N. Wilde, £1,000; Queen's Coroner and Attorney, Mr. Fred. Cockburn, £1,200; Master at the Crown Office, Mr. J. R. Mellor, £1,200; Associate, Mr. T. W. Erle, £1,000; Associate Exchequer Division, Mr. H. Pollock, £1,000; Master, Sir F. Pollock, £1,500; ditto, Mr. G. F. Pollock, £1,500; Queen's Remembrancer, Sir F. Pollock, £2,000; Secretary to Sir J. Hannen, Mr. J. C. Hannen, £300; Secretary to Sir R. Phillimore, Mr. Walter Phillimore, £300; Registrar in Bankruptcy, Mr. J. R. Brougham, £1,300; Clerk of Assize for Home Circuit, the Hon. R. Denman, £953; Associate, Mr. R. Denman, Jr.; Clerk of Assize, Midland Circuit, Mr. Arthur Drake Coleridge (salary not mentioned); Clerk of Assize, Oxford Circuit, Mr. E. Archer Wilde,

£1,000; and Clerk of Assize, Western Circuit, Mr. W. C. Bovill, £1,000.

DISPOSAL OF ARREARS.

In a communication to the *Times*, "A Solicitor" gives some information respecting the efforts which have been made at various times in England, in recent years, to clear off judicial arrears by the appointment of additional Judges. The writer takes occasion, from the facts stated, to deprecate additional judicial appointments without serious consideration. In the case of the Judicial Committee, however, there can be little doubt that the salaried appointments were urgently demanded by the exigencies of the case. In the year 1871, he says, a considerable number of cases were waiting for hearing before the Judicial Committee of the Privy Council. To remedy this an Act of Parliament was passed, under the provisions of which four permanent Judges were appointed, with salaries of £5,000 each. These Judges, without any extraordinary exertions (for they only sat five days a week for about five hours each day), cleared off all arrears, and, after an adjournment of upwards of three months, the Court recommenced its sittings in the autumn with a list of seven cases—viz., four Colonial Appeals, two Indian appeals, and an application for the prolongation of two patents. The writer estimated that this business would occupy about seven days, and thought it more than probable that at the expiration of about that time the learned Judges would have nothing to do.

In the year 1876, in consequence of complaints as to an arrear of appeals in the House of Lords, two Law Lords were appointed, each with a salary of £5,000 per annum, and the House was empowered to sit for the purpose of hearing appeals at any period of the year. The House sat for a few days in November, 1876, and then adjourned until the Session of Parliament in February, 1877, when its ordinary sittings were resumed. The arrears were thus, without difficulty, disposed of, and the House resumed its sittings in the fall with a list of 14 cases. Although this list would doubtless be added to before August next, the writer considered it certain that a great part of the time of the recently appointed Judges would be unoccupied.

"A Solicitor" believes that the services of Judges of the ultimate Courts of Appeal might have been made available for assistance in the intermediate Court of Appeal, in like manner as those of the Lord Chancellor are, and thus some of the Judges who are now required in that Court would have been free to act as Judges of First Instance. This would be somewhat like taking the Judges of the Supreme Court of Canada to sit in the Ontario Court of Appeal, a scheme which would be open to question. While it is certainly desirable that judicial functionaries should not be allowed to grow rusty, it is hardly expedient to shift them about from Court to Court in the endeavour to fill up every moment of leisure time.

THE TOOLS OF THE LEGAL TRADE, AND HOW TO CHOOSE THEM.

(Continued from p. 192.)

But, as the *law* that bodies on and above the earth tend toward its centre may be remembered, while all the numberless instances in which they have actually done so cannot be; so, in like manner, a man may learn and remember most of the *laws* which govern the overwhelming masses of decisions collected in our books of reports, provided they are duly and accurately pointed out to him. No man, with the reports alone, can collect all himself; because this would require, not only the reading of the reports, but the continual and extensive collating of case with case. For one to attempt this would be to consume a lifetime in the most laborious work before he was half ready to "put up his shingle" for practice.

The foregoing views, in which the thing to be done appears, disclose to us in some measure the sorts of tools needed. Of course, we need the reports; and, as helps to find the cases in the reports, the digests. Beyond that, we need to have the principles of the law in general, and those which govern each particular subject, collected for us.

Not to pause, therefore, on the obvious necessity of reports and digests, let us proceed to the more important matter. Under the names of treatises and commentaries on the law, we have great numbers of different sorts of books. The majority of them are, in fact,

digests, and no more; and many of them are poor, at that. But there are among them works which are truly what they profess to be—varying, however, greatly in merit. A treatise or commentary, which is truly such, may be the most worthless book in a lawyer's library, or it may be the most valuable. It is absolutely essential, both to the study and the practice of the law, that there should be some good books of this sort, and very desirable that they should be multiplied to include all departments of legal knowledge. Their function is to *collect the doctrines*; in other words, to state—what the decided cases are mere evidences of—the law. They reduce the evidences to their results.

Let us see how this is. The law is the legal rule. The facts of cases are ever varying, but the rule remains the same. The author compares case with case, and, from a multitude of cases, derives a rule. Perhaps he is aided in this by some judge in some case having before him derived the rule, or perhaps he is not. If he is thus helped, he still has to see whether the judge was correct. If he is not thus helped, his labor is still greater. In either alternative the deduction which he sets down must be correct, or his book is no suitable tool for the practitioner to work with. Assuming the book to be thus [correct, the practitioner, desiring to know what the result would be on a given state of facts, takes it in his hand, and finds in it the rule which covers the facts. These facts may never have transpired before; but he has become just as certain how this "new case" should be decided as how an old one was, if decided correctly. And in the same way he ascertains whether the adjudication in an old case was right or wrong. If, on the other hand, the book states the rule erroneously, it is a false guide; and the mariner might as well sail by a chronometer out of time as for him to employ the book in his practice.

It becomes, therefore, in every case in which a treatise or commentary is relied upon, a proper subject of enquiry whether the rule stated by the author is correct. The name of the author, however eminent, is not conclusive, nor is the fact that the ablest judge who ever adorned a bench has given voice to the same rule. Either circumstance, and especially the two combined, may furnish strong *prima-facie* evidence; but neither, nor both, can be accept-

ed as conclusive. A practitioner, therefore, who uses a tool of this sort should be in a position to withstand a challenge of it by his adversary.

This is one point of view, out of several, from which we may approach the disputed question as to how fully the cases should be cited in such a book. There is a difference in the scope and aim of books of this general sort. If the design is merely to present leading doctrines for the instruction of students and the occasional reading of practitioners, and the book is not meant to be used as a working tool in the legal trade, and if its doctrines are merely the familiar and admitted ones—that is a case which I shall not pause to discuss, for I am considering the tools. Where the book is a tool, and its temper is to be tried in hard conflicts in court, plainly it would be defective should it cite only a single case out of a hundred on a disputed question. And, I submit, it would be dishonest if it cited the cases on one side of such a question and made no allusion to the other, or even to the fact that the question is disputed; though, I acknowledge, there are good books by excellent authors, who are personally honest, written on exactly this principle. I distinguish the author from the man; the one is honest, the other is not.

Again, the great number of states in our Union, and the fact that under the United States government questions may be decided in differing Circuit and District Courts with no appeal to the Supreme Court, create a want in our text-books such as could not be known or appreciated in England. Every practitioner desires to see, first of all, the authoritative decision of his own court on the question in hand. To enable him to do this—that is, to present to each reader the one case which he specially craves, and no more—may require the citation of nearly half a hundred in all to the one proposition. An excellent lawyer, practising in a large eastern city, said to the writer a few days ago: "Do you not think it a great mistake in authors of legal treatises to make in them any citations from the southern and western reports? They are of no authority." Now, this suggestion, hard as by implication it might seem on the court in which this lawyer practises, reveals the common truth. The practitioner wants, first of all, the cases

which will most influence the decision of his own tribunal. He will never thank the author of the book which he uses as a tool for leaving them out, however he may grumble about the rest.

And why should not the author of a book, which is to be used as a tool, having looked, as he ought, into all the cases for his own guidance, refer his readers to such as they also may have occasion to consult? It is said, by some, that the referring to many cases is a thing very easily done. But suppose it is easy; so is the copying of words from a judicial opinion, or from another text-book—except that, with some authors, it is impossible to make the marks of quotation. Yet this does not prove that words should not be copied. It is also said that the reader can find for himself the cases in the digests. That is not true, as to all of them, if the text-writer has done his duty. But, if it were, still a tool is, in part, for labor saving. Why should not the treatise serve for the finding of the cases, like a digest, when it can be made to so easily? Moreover, this fullness of citation protects the lawyer who uses the book from the opposite party, who else might produce to the court a case apparently adverse to the doctrine, with the exclamation, "There is something which it should open the understanding of your careless author to read!"

Such appears to be the true method, expressed in general terms. With a judicious author it will have many exceptions. Thus, some branches of the law are so heavy with cases, and already so well settled in their leading principles, that this could not be done without making his book unprofitably large. Suppose, for example, this plan was adopted and strictly adhered to by the writer of a treatise on evidence! His book, unless greatly larger than heretofore deemed necessary for this subject, could contain little or nothing besides cases. And there are so many other exceptions as considerably to qualify the rule.

Again, there are lawyers who, seeing the citations of cases to be very numerous, draw the inference that, therefore, the author is a slave to them, and his book is a mere digest. The truth is that the number of cases has nothing to do with the character of a book in this respect. One who can truly master a hundred can master equally a hundred thousand. An

incompetent writer may conceal his weakness with the hundred better than with the hundred thousand. There is no other difference.

I am now to give some practical hints as to the methods of testing a book which it is proposed to use as a tool.

There are few exceptions to the rule that a digest should contain all the cases. And a treatise should have all it professes to. We take into our hands the book, whether treatise or digest, and see what are its scope and claim. If these require all the cases, they also, by implication, require that each case be cited to every important point within the subject of the book. For example, should a work on dower pretend to have every case, and should *Doe v. Roe* be on the question of the marriage which will give dower, and likewise on the question of the effect of an ante-nuptial contract with a third person to sell the land to him, the holding-out of the author would not be fulfilled by his referring to *Doe v. Roe* only under the former head. We open the book to its Table of Cited Cases. Then we look through any volume of reports wherein we anticipate that there are cases which ought to be found within the book, turning the leaves carefully over, one by one. Coming to a case, we see whether it is in the Table of Cases. If it is not there, we note the fact and proceed. If it is there, we turn to the case at the place, or several places, to which we are referred, and observe what the author has done with it. If he has cited it at every important point, then, so far, his profession is realized; otherwise, it is not. To save time, we here anticipate a further enquiry by noting the manner of his use of the case. Do the text and it correspond? If he has undertaken to state its effect, is it correctly done? In this way we go on, comparing volume after volume of the reports with the book, until we become satisfied how far promise and fulfilment, as to the cases cited, correspond.

This method is easy and conclusive; but, in a given instance, we may be already in possession of knowledge which will enable us to shorten the process. Thus, I now take into my hands a digest on a special subject. The author, in his preface, says it incorporates all the American cases of any importance on the subject, omitting such as are obsolete or of merely local or temporary interest. I happen to know that not

long since, a lawyer made a collection, not of all the cases, but of the cases which he deemed to be of this class, for a single year, and counted them. And I know that the cases on a given subject will average about the same in successive years, except that the number gradually increases with the growth of the country. So, I count the author's cases in his Table of Cases; and the result is that they number considerably more than a six years' supply, but less than a seven years'! This is discouraging. Still, let us not do him injustice, but look further. Perhaps he deems that the larger part of what are commonly termed states are not such in law, their admission to the Union being illegal; for which reason he ignores them. But, no; an examination readily shows that he has referred to cases in all, or nearly all, the states. And among them are cases from the inferior courts, as well as from the superior. Yet we discover that with him, contrary to Campbell, "distance" does not "lend enchantment to the view." We count the cases from one of the states remote from his home, and find that they number less than one year's supply. Next, is not his *selection very select*—only the very most important cases being included, and an enormous amount of chaff winnowed away? To answer this we open the book to the first title which happens to occur to us, upon which we know something of the cases, and, according to our ideas, the more important are not there, while a part of the less important are. But, stay; this may be deemed by him a minor title; let us turn to one which all will agree to be leading. Under this title, according to what we know to be common opinion, the most important cases consist of a considerable line decided by the Supreme Court of the United States. We look carefully through this title; well, we do find in it a paragraph on a single point, among several, decided in one case by this court. So, the Supreme Court of the United States is not beneath the author's notice. The point does not seem to us to be the most important one in the case, but perhaps it is. We remember that there is lying by us a carefully-written argument by counsel in a cause involving a question within this title. In it the case in the digest is referred to, but to a point other than the one digested; and, besides, there are seven other

cases from the Supreme Court here cited and commented on. The book, therefore, is not what it professes to be.

When examining a book, there is no more perplexing discovery than the not unfrequent one that there is no connection between the preface and the book itself. It is natural to apply the maxim *Falsus in uno, falsus in omnibus*, and condemn it at a breath. If a writer does not know better than really to suppose he has all the cases, or all the important ones, when perhaps he has not a quarter of them, evidently not much to edification can come from him. If he does know better, then we have forced upon us a topic not pleasant to discuss. But it is never possible to discover whether or not an author is, to the fullest extent, responsible for his preface or title-page. These are the parts into which, more than into any other, publishers in general deem themselves entitled to thrust their improving or deforming fingers; and, though an author may not concede their right, he may be so cornered by them that, practically, he has no alternative but to yield. The sale of a single volume, it may be readily anticipated, will be greater if the purchasing lawyers can be made to believe it has all the cases on its topic, than if the topic were swelled to four volumes, containing truly all of them. So, of the volume just mentioned, the advertisements by the publishers, as far as I have noticed, open by declaring it to contain all the American decisions upon its topic, from the earliest period to the time of publication; though they have an ending in the terms of the preface. Here is a conflict. Did the pressure proceed from them to the author, or from the author to them?

Moreover, a style of preface is sometimes adopted leaving it not quite clear to every reader what is meant. An author, for example, uses, in the main, the English text-books, instead of the reports, in making so much of his book as does not depend on the American decisions; and copies the citations from those books into his notes. Then, in his preface, he tenders a sort of acknowledgement of indebtedness to English authors for help in general and particular. There happens to be an English book which, I will suppose, is named *The Chum Cud*; it is in several volumes; and, among its subjects, is that of our American

author. Other subjects in *The Chum Cud* have no relation to this one. It appropriates a separate volume to one such subject, and in some new editions of the work this volume is enriched by various cases not in the regular reports, or reported in them less perfectly. So, our American author makes a special bow to *The Chum Cud*, from which, he says, he has repeatedly drawn cases not in the reports, or given in them but imperfectly. Now, does he mean that he has mingled the topic of this special volume of *The Chum Cud* with his own? A slight examination will show that, most judiciously, he has not. Has he, in fact, drawn any cases, as he seems to say he has, from *The Chum Cud*? No, not from this special volume nor particularly from any volume of the edition mentioned. In one of the English text-books from which he compiled the English part of his own there is a reference to *The Chum Cud* for a single sentence in one case, which, however, is given at great length in the reports. So, our author has this reference for this one case; but for no other case does he cite *The Chum Cud*. And that is right; because it contains no cases of the sort under consideration, relating to his subject. What, then, is meant? Is the statement in the preface false? Of course it is not. Should your friend tell you that he had just been strengthened by eating an ice-cream out of the new moon, you would not understand him as literally affirming that the new moon is a dish, that ice-creams are in it, and that he had just been there and eaten one. Why? Because the thing is palpably impossible. You would rather understand him as indulging in some pleasant figure of speech. In the instance before us it is not important to inquire what is the rhetorical name of the figure of speech in which the author of the preface indulged, or what is the literal meaning intended to be conveyed. But a practical difficulty distinguishes a case like this from the supposed one of the moon. Everybody sees the moon, and knows all about it. Few could be made to believe, even on the authority of an astronomer, that the new moon is a dish, filled with a ball of ice-cream. But *The Chum Cud* is not, in this country, a familiar object, like the moon; it is a book seen, with us, only in large libraries, and rarely or never used; and few American lawyers know what particular

editing has been done to its several volumes in each successive edition. Hence, profitless time has been spent in searching in the *Cud* for the supposed cases which it reports perfectly, but which are given imperfectly, or not at all, in the reports, upon the subject of the American book. So that, in an hour of disappointment, the ungracious thought has even arisen that an American author, who merely sought to please his readers, by an unique figure of speech in his preface, conveying really, it may be, the idea that the supposition of his having looked beyond the English text-books for the English law would be as mistaken as to suppose he had gone to *The Chum Cud* for cases not elsewhere to be found, had, instead thereof, attempted to mislead his readers by pretending to a wider research than truly he had made.

That such a mistake is not unnatural will appear from a further illustration. There is an excellent English book, familiarly known to the American profession, especially through successive American reprints. After a certain edition of it in England had been before the profession twelve years, a new and revised edition there appeared. And, when this new English edition had become well known both there and here, a fresh American edition was issued, "Reprinted," said the American editor, "from the last London edition." In fact, the reprint was from the twelve-year-old edition, and not from the one which was the last at the time when it was published and the title-page took its date. But, on a careful inspection, one could see that the date of the American editor's announcement was long before the day of publication, in the year preceding the one standing on the title-page, and a fair space of time anterior to the English issue. Moreover, plain on the title-page stood the English numbering of the edition, and the name of its English editor. The English date was nowhere given. Everything, therefore, was really all right, the same as in the case of the book which referred to *The Chum Cud*. But I have before me a magazine notice of this reprint, written by one of the most careful, honored, and able legal persons in the country, wherein he has observations, arising from an inspection of the reprint, upon legislative changes of the law in England "within the past quarter of a century!" Nor will any one blame him for the blunder. Few

American lawyers can carry in their memories the numbers and dates of English editions, and the names of the respective editors, with such accuracy as to say that an American reprint, just issued, and professing to be from the "last London edition," is really from an earlier one.

Some will chide me for saying so much of the preface, which, they will affirm, is not, like the rest of the book, used as a tool of the legal trade. But a tool without an owner is of no use in anything; and a book, to be serviceable, must find purchasers. The preface is not sold separate from the rest, and, as Sir Knight Hudibras wisely reasoned of his horse and single spur, if the preface side of a book is stimulated to an "active trot," the tool side will go with it.

In truth, however, the preface is a tool, and often a very important one. If Mr. A has in court a cause involving large interests, and Mr. B is the lawyer opposed to him, then, if A can prevent B from laying before the tribunal a series of unanswerable adjudications on B's side, Mr. A may so manage as to obtain a victory to which he is not justly entitled. If Mr. B has already in possession a book which, according to the preface as he reads it, contains all the cases on the subject, so as to render any further looking unnecessary, yet it has not in fact all of them, or especially those on which B's success depends, here is "luck" for A. The preface has performed its mission as a tool, without A's putting it in motion. But A is on excellent social terms with B, open-hearted and generous, and perhaps B does not own the book; so A kindly loans it to him. Here the preface, as a tool, dexterously handled by A, is lodged in the soft part of B's brain, and the cause is won.

We see, therefore, why a preface, when it is to do this sort of work, should be so framed as to admit of being read two ways. The sharp lawyers, looking into it, will comprehend the situation and purchase the book, not so much for personal use as to lend to their less sagacious brethren; and, of course, they will always have for it a good word. The other class, when able, will buy it to use themselves, because of what they believe it to be. If, for example, they understand it as professing to have all the cases, no doubt that it has them will cross their minds; and they will be happy in the reflection

that the labor of searching through many books is at an end, and that now they will be even with the other fellow who has beaten them so many times. In such happiness, though unfounded, we see a beautiful compensation which nature makes for the want of original bane in the understanding. And, assuming that such a lawyer belongs to the class who will learn only in the school of experience, he acquires, on being unexpectedly overcome through something which his book does not contain, a valuable lesson, lasting him through life.

[To be continued.]

CURRENT EVENTS.

ENGLAND.

ILLICIT FEES.—A Manchester Solicitor named Bent has been sentenced to five years' penal servitude for receiving property knowing it to have been stolen. It appeared that the prisoner defended a man charged with robberies at railway stations, and took part of the proceeds for his fees. Mr. Justice Brett, in passing sentence, said the prisoner was a grasping, rapacious man, who had betrayed his trust, and assisted the bad to plunder, and then stripped them of all they had.

A VEGETARIAN IN TROUBLE.—An inquest was held in Oldham recently on a woman alleged to have been starved. Her husband was a strict vegetarian. She had been recently confined, and he refused to call in medical attendance or give her anything but food composed of wheat or rice. The jury censured the husband.

UNITED STATES.

PRISONER AND COUNSEL.—A rather unusual scene took place in a Philadelphia Criminal Court on the 6th inst. An individual who bears the astonishing name, Blasius Pistorius, has been twice tried and convicted of murder in the first degree. The first conviction his counsel were able to set aside, but as the facts were such that there was no hope of a verdict of acquittal, they advised him to plead guilty of manslaughter, it being understood that this plea would be accepted. He refused to do this, and was convicted. A motion was thereafter made by his counsel for a new trial, at the argument of which he was present. After one of

the counsel had spoken in favor of the motion, the petitioner arose and delivered a long speech, in which he reviewed the evidence, and made severe charges against the members of the legal profession who had had anything to do with the case, charging his own counsel with having been in collusion with the district attorney, and stating that he had been convicted in order to please Prince Bismark. The speech of the prisoner was read from a manuscript, and although quite lengthy, was listened to to the end by the court.

CANADA.

TREASURE SEEKING.—Apropos of the discussion respecting the perils to which Judges are exposed, an amusing incident is chronicled by the daily press. The gardener of Judge Coursol had been for several nights much alarmed by the appearance in the Judge's garden, at Montreal, night after night, of two men who conducted themselves in an extraordinary manner. He mentioned the matter to the Judge, who asked Detective Lafon to take the case in hand. Lafon accordingly, with a posse of police, concealed himself in the garden, and after patiently waiting some time, at the accustomed hour, eleven o'clock, the two mysterious men made their appearance. One was attired in priestly robes; which were covered with pictures of the saints, &c. Around his neck he wore a long string of beads, to the end of which a cross was attached; a watch hung from a chain down his back; a sword hung from his side in close companionship with a flask of holy water, and in his left hand he held a sponge attached by a wire, which he squeezed, occasionally squirting the water around him. Behind him came his confederate, holding up the robe of his principal from contact with the ground, and watching the passage of time as indicated by the watch upon his back. The two made their approach towards a certain apple tree in a most methodical manner, under which, when they arrived, they commenced their incantations, walking around it, the leader invoking the aid of heaven to bring up the treasure. They were arrested and brought to the Canning Street Station, where the principal gave his name as J. Sudan, a Swiss, and his confederate as Leopold Boone, a Belgian. Sudan said he had been told by one Racine that a great many noblemen had

hidden treasure in strong boxes and buried them in the ground, and his calculations showed him that one of them was buried in the Judge's garden, just under the apple tree they had visited. The Judge laughed heartily and ordered the prisoners' discharge.

THE INSOLVENT ACT.—The *Monetary Times* takes the following view of the failure to carry the repeal of the Insolvent Act: "The Dominion Board of Trade, at its last meeting, opposed the repeal of the bankrupt law by a vote of twenty-five against seven. And now the House of Commons has followed suit by a vote of ninety-nine against fifty-five. The question was brought up, on a motion for the second reading of a bill, introduced by Mr. Barthe, for the repeal of the Act. All question of the repeal of the law will probably be set at rest for the present. There are two ways of looking at the bankrupt law; one is, to regard it as a means of winding up, as it was intended to be, insolvent estates in an equitable manner, and giving the debtor a free discharge, if he were deserving of it; another is, to regard it as a means of increasing the number of insolvencies. There is some truth in both these views. The chief cause of insolvency is a glut in the market; and the bankrupt law may be perverted so as to make traders less careful of entering into transactions which lead to insolvency. Mr. Barthe saw in the number of failures a reason for the repeal of the law; a number which he stated at 7,554 since 1873, with aggregate liabilities to the amount of \$100,000,000. In other words, every third trader had failed. But in the absence of a bankrupt law, there would certainly have been less than it has been. But there would have been great difficulty in winding up the insolvent estates, and it would have been done in a far less equitable manner. A permanent repeal of the bankrupt law is out of the question, though we are not certain that it might not occasionally be suspended, for a time, with advantage."

DIGEST OF QUEBEC DECISIONS.

The following is a digest of the decisions reported in Volume 21 of the Lower Canada Jurist, (1877) which have not been noted already in the *LEGAL NEWS*.

Abduction.—On an indictment for abducting

a girl under the age of 16, where it appeared the girl had left her guardian's house for a particular purpose with his sanction, *held*, that the girl did not cease to be in possession of her guardian within the meaning of the statute 32 & 33 Vic., c. 20, s. 56.—*Regina v. Mondelet*, Q. B., p. 154.

Absentee.—An absentee cannot be legally summoned by advertisement on the ground that he has property in the district of Montreal, when the evidence shows that such property consists merely of a *bon*, not produced nor proved to be in the possession of the defendant.—*Poirier & Lareau*, Q. B., p. 48.

Account.—1. An account rendered and filed under a judgment of the court, will be rejected as irregular, if it does not exhibit the three heads of receipts, disbursements, and what remains to be recovered.—*Les Curé, &c., de Beauharnois v. Robillard*, S. C., p. 122.

2. An account unsustained by vouchers will not be rejected on motion, when it is established by affidavit that the vouchers are in the possession of third parties.—*Chevalier v. Cuvillier et al.*, S. C., p. 308.

Adjudicataire.—An obligation by an *adjudicataire* in favor of the Sheriff, by which the *adjudicataire* promises to pay the Sheriff the amount of his purchase money, with interest, is against public order and the laws regulating the office of Sheriff, and is, therefore, null.—*Berard & Mathieu*, Q. B., p. 234.

Affidavit.—See *Practice*.

Agent.—1. A notarial power of attorney to manage and administer the affairs of the constituent generally, and in so doing to hypothecate the constituent's property, is not an authority to sign promissory notes in the name of the constituent.—*Serre dit St. Jean et vir, & The Metropolitan Bank*, Q. B., p. 207.

2. The statements made by the agent, to the effect that he had authority to sign notes for his principal, cannot make evidence against the principal, the power being governed by the terms of the written power of attorney.—*Id.*

See *Bank Account*.

Appeal.—1. The Court of Queen's Bench has discretionary power to allow an appeal to the Supreme Court, after the delay mentioned in the statute.—*Caverhill & Robillard*, Q. B., p. 74.

2. A security bond, duly signed by the Prothonotary, and stamped, cannot be set aside by

the Court of Queen's Bench on the ground that the security was executed by error and surprise.—*Mallette & Lenoir*, Q. B., p. 84.

3. A judge of the Court of Queen's Bench has power in Chambers to extend the delay for giving security on an appeal to the Privy Council beyond the delay ordered by the Court as that within which security must be given, whenever he is seized of the matter prior to the expiration of such delay; and, on security being put in within such extended delay, the respondents are estopped from executing the judgment appealed from.—*The Mayor &c. of Montreal & Hubert et al.*, Q. B., p. 85.

4. An appeal lies directly to the Supreme Court from the judgment of the Superior Court sitting in Review, in cases not under \$2,000, where the judgment having been confirmed in Review against the party inscribing, no appeal lies to the Court of Queen's Bench.—*Abbott v. Macdonald*, C. R., p. 311.

See *Privy Council*; *Insolvent Act*; *Practice*; *Security for Costs*.

Arbitration.—The Courts have a right to refer to arbitration disputes between relations, where the facts are difficult of appreciation, without its being necessary that the contestation should be the result of relationship.—*Robert & Robert*, Q. B., p. 18.

Attorneys.—See *Practice*.

Auctioneer.—An auctioneer is not liable personally, on a sale made by him for a disclosed principal.—*Larue v. Fraser*, S. C., p. 309.

Aveu Judiciaire.—The *aveu judiciaire* cannot be divided, and, therefore, an admission that the price of sale was not really paid, as stated in deed, coupled with the statement that the deed was really a donation, and not a sale, cannot be divided.—*O'Brien v. Molson, & O'Brien v. Thomas*, S. C., p. 287.

Baggage.—See *Carrier*.

Bailiff.—See *Practice*.

Bill of Exchange.—See *Prescription*.

Bank Account.—Where a bank account has been kept, in the name of M. C., as the agent expressly of C. S., and that account has been closed, and a new account opened in the name simply of "M. C., agent," and it is proved that M. C. was in reality (although unknown to the bank), the agent not only of C. S. but of various other parties, all of whose funds were indiscriminately deposited and withdrawn in the

name of "M. C., agent," C. S. cannot be held for an overdrawn balance due by "M. C., agent," in the absence of any special evidence to establish indebtedness to the bank by C. S. personally.—*The Metropolitan Bank v. Symes et vir*, S. C., p. 201.

Bon.—An unstamped *bon* is null, and an action founded thereon will be dismissed with costs, even though the defendant has not pleaded the non-stamping of the *bon*.—*Hudon & Girouard*, Q. B., p. 15.

Bornage.—1. Where an action *en bornage* is brought without previous demand, with a claim for damages joined thereto, of which no proof is made, the plaintiff will be condemned to pay the costs of the suit.—*Rochon v. Côté*, S. C. p. 273.

2. See *Encroachment*.

Builder.—A builder cannot claim to prove, either by parole testimony or the oath of the opposite party, his claim to extra work, in the absence of the order in writing therefor required by art. 1690 C. C.—*Beckham v. Farmer*, S. C., p. 164.

Building Society.—See *Tirage au Sort*.

Calls.—A subscriber to a Company to be incorporated under Letters Patent, but who never subscribed after the incorporation, nor paid calls after such incorporation, is not liable to be sued on the stock thus subscribed for.—*The Union Navigation Company & Couillard*, Q. B., p. 71.

Capias ad Respondendum.—1. The mere filing of the statement in conformity with art. 764 C. P. does not entitle the party arrested to be released from custody, such statement being subject to attack by any creditor within the delays mentioned in art. 773.—*Bruckert v. Moher*, S. C. p. 26.

2. A writ of *capias* issued on the ground of fraudulent departure from the Province, will not lie, when the defendant is domiciled in the U. S., and is merely returning home after a temporary sojourn here, and there is no allegation of any special circumstances of fraud.—*Renaud & Vandusen*, Q. B., p. 44.

3. Where a *capias* has been declared good and valid, and the defendant, in appealing from the judgment, gives security for costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the bail on

their bond to the Sheriff.—*Lajoie & Mullin et al.*, Q. B., p. 59.

4. An affidavit for *capias* is defective which deposes that the departure of the defendant "may" deprive the plaintiff of his recourse, in place of using the words of the Code of C. P. "will deprive."—*Stevenson v. Robertson*, S. C., p. 102.

5. An affidavit for *capias* which deposes in the alternative, that "the defendant has secreted or made away with or is about immediately to secrete or make away with his property, &c." is defective.—*McMaster v. Robertson*, S. C., p. 161.

6. An affidavit for *capias* is defective, which used the words, "peut être privé de son recours," in place of the words "privera, &c.," and which omitted to depose as to the intent to defraud.—*Ford v. Léger*, S. C., p. 191.

7. The allegation in an affidavit for *capias* that deponent believes and is informed that the defendant is about to secrete "*ses biens meubles et effets mobiliers*," is defective, and the affidavit is also bad on account of the failure to state therein the special grounds and reasons of such belief.—*Augé v. Mayrand*, C. R., p. 216.

8. The pretensions of a defendant, who, after being arrested under a writ of *capias*, leaves the country and refuses to appear for examination, will not be favourably regarded by the Court.—*The Molsons Bank v. Campbell*, S. C. p. 280.

9. A writ of *capias* on the ground of sequestration of property, may issue against a debtor resident in Ontario, for secreting property in Ontario, if the debtor be found in this Province.—*Gault et al. v. Robertson, & Robertson*, petr., C. B., p. 281.

10. A defendant arrested under a writ of *capias* must raise all his objections, *in limine litis*, against the sufficiency of the affidavit, and not merely in appeal.—*Heyneman & Smith*, Q. B., p. 298.

Carrier.—The notice on a passenger's ticket, that the carrier will not be responsible for the safe-keeping of the passenger's baggage, is not binding on the passenger, without proof of notice to him of this limitation of liability.—*Woodward v. Allan et al.*, S. C., p. 17.

Cause of Action.—1. In an action by a creditor of a Railway Company against a shareholder in such Company, to recover the amount unpaid on his shares, the cause of action arose at

Montreal, where the Company had its principal office, and where judgment was rendered for the debt due by the Company and execution was also issued, and not at Bedford, where the shareholder subscribed for his shares.—*Welch v. Baker*, S. C., p. 97.

2. The cause of action is determined by the place where the note sued on is made, and not by the place where it is made payable.—*Mulholland et al., v. The Company, &c., of A. Chagnon et al.*, S. C. p. 114.

Certiorari.—See *Licence Act; Jurisdiction*.

Circuit Court.—See *Jurisdiction*.

Collocation, Report of.—See *Practice*.

Commercial Debt.—See *Prescription*.

Contrainte par Corps.—Where a rule for *contrainte par corps* has been made absolute, it is not competent to the party condemned, by a subsequent petition, to allege payment and non-indebtedness previous to the judgment on the rule.—*Genereux v. Howley et al., & Jones*, petr., S. C. p. 162.

Composition.—See *Promissory Note*.

Congé Défaut.—1. The *congé défaut*, on a rule, will be granted without costs.—*Larin v. Deslorges, & Séry, mis en cause*, S. C. p. 206.

2. When *congé défaut* is asked by a defendant, under art. 82 C. C. P., notice of the application to plaintiff is unnecessary.—*Chalut v. Valade et al.*, S. C. p. 218.

Costs.—See *Congé Défaut; Practice*.

Costs, Security for.—1. When claimed by dilatory exception and security given, the costs on the exception will be reserved to abide the issue of the suit.—*Akin v. Hood*, S. C. p. 47.

2. Where an opposant is a non-resident, though his domicile has been in this Province, he will be required to give security for costs.—*Gravel v. Mallette, & Mallette*, opposant, S. C. p. 162.

3. The Court in Montreal has no jurisdiction to order that the security for costs offered by the plaintiff, who appealed from a judgment of the Court for the district of Montreal, should be taken before the Prothonotary or a Judge in the district of Rimouski.—*Fournier v. Delisle*, S. C. p. 163.

4. A demand for security for costs from an insolvent will not be granted unless the insolvent is such under the Insolvent Act.—*The Niagara District Mutual Fire Insurance Company v. Mullin*, S. C. p. 221.

5. An Ontario Insurance Company, though doing business in Montreal, is bound to give security for costs.—*The Niagara District Mutual Fire Insurance Company v. Macfarlane et al.*, S. C. p. 224.

See *Insolvent Act*.

Damages.—The Corporation of Montreal is liable for damages caused by the bad state of one of the public footpaths in the city.—*Grenier v. The Mayor et al. of Montreal*, Q. B., p. 296.

See *Priest*.

Delegation.—1. The one in whose favour a delegation is made in a deed of sale may sue for the money thus delegated to be paid to him, without alleging any acceptance of such delegation.—*Brisbois v. Campeau*, S. C. p. 16.

2. The registration of a deed containing a delegation of payment does not operate an acceptance of such delegation.—*Mallette et al. v. Hudon*, S. C. p. 199.

See *Unpaid Vendor*.

Demand of Payment.—The want of demand of payment cannot be urged successfully, in the absence of a deposit in Court of the debt due.—*Smallwood v. Allaire*, C. R. p. 106.

Donation.—An unregistered deed of donation of moveables cannot avail as a title to such moveables against creditors of the donor.—*Crossen v. O'Hara, & McGee*, opposant, S. C. p. 103.

See *Married Woman ; Marriage Contract*.

Draft.—Where a Bank discounts the unaccepted draft of A on B, for the purpose of retiring B's acceptance on a former draft, on the faith of a telegram from B to A to draw on B for the purpose aforesaid, the Bank may recover the amount of such draft on B, although he subsequently refuse to accept the same.—*The Molsons Bank v. Seymour et al.*, S. C. p. 82.

Election.—1. Where the respondent, in answer to a petition contesting his election as member of the House of Commons, makes counter charges against the unsuccessful candidate, who is not a party to the cause, and in whose behalf the seat is not claimed, and prays that he be disqualified, such petition is an election petition, and must be accompanied by security and all other formalities prescribed by the Dominion Controverted Elections Act, 1874.—*Somerville et al. & Laflamme*, S. C. p. 240.

2. The section 100 of the Dominion Contro-

verted Elections Act of 1874 does not preclude the recovery of accounts for lawful expenses connected with an election, unless the expenses were incurred with a corrupt or illegal motive.—*Workman & The Montreal Herald Printing and Publishing Company*, Q. B. p. 268.

3. The costs of an election feast, after an election (in 1867) had been closed, are not recoverable.—*Queeremont & Tunstall et al.*, Q. B. p. 293.

Encroachment.—In an action for encroachment on a lot of land by building beyond the line of division between it and the adjoining lot, where the encroachment is clearly proved, judgment may be rendered accordingly without the necessity of a legal *bornage*.—*Levesque & McCready*, Q. B. p. 70.

Enquête.—An inscription for *enquête* must be filed at least eight days before the day fixed for the trial.—*Latour v. Gauthier*, S. C. p. 39.

Evidence.—The entries in a merchant's book make complete proof against him.—*Darling & Brown et al.*, S. C. p. 169.

See *Agent ; Builder ; Interest ; Trouble*.

Exception à la forme.—1. The description of a plaintiff in a writ of summons, as carrying on the "trade and business of banking in the City of Montreal, in the district of Montreal and elsewhere," is a sufficient compliance with the requirements of Art. 49 C. P.—*Bureau & The Bank of British North America*, Q. B. p. 261.

2. An appearance and plea by a person who was not served in the cause, though the writ purported to be addressed to him, will be rejected with costs where the evidence showed that he was aware of the error in the writ. In such a case if the party fears that judgment may be erroneously rendered against him, his proper course is to come in by intervention.—*The Exchange Bank of Canada v. Napper et al.*, S. C. p. 278.

Exception Déclinatoire.—See *Cause of Action ; Jurisdiction*.

Executive Council.—The members of the Executive Council who concur in an order of Council sanctioning the sale by the Crown of certain real property, and the execution of a deed of sale in accordance with such order, cannot be sued *en garantie* by the purchaser, to guarantee and indemnify him against an action brought by the Attorney-General for

and on behalf of Her Majesty, to set aside the deed of sale, on the ground (*inter alia*) that the sale itself was *ultra vires*, and that the deed was executed without lawful authority.—*Church, Atty. Gen., pro Regina, v. Middlemiss & Middlemiss, plff., en gar. v. Archambault et al., defts., en gar.*, S. C. p. 319.

Executors.—1. Executors are not liable, jointly and severally, for the payment of the balance of moneys collected by them, but are only liable each for the share of which he had possession.—*Darling et al. & Brown et al.*, S. C. p. 125.

2. Executors are not liable to pay more than 6 per cent. interest on the moneys collected by them after their account has been demanded, in the absence of proof that they realised a greater rate of interest by the use of the money.—*Id.*

Exchange.—In the case of an exchange of horses, it is not competent for a party, sued on a note given as boot on such exchange, to plead non-liability, on the ground of a redhibitory vice in the horse received by him, and without bringing any action to set aside the exchange; especially where such plea is filed several months after the defendant knew of the vice and had tendered back the animal.—*Veroneau v. Poupart*, S. C. p. 326.

Experts.—When the report of experts has once been made, they are *functi officio*, and cannot of their own motion make a new report on the ground that the first is imperfect or defective.—*Beckham v. Farmer*, S. C. p. 38.

Extra Work.—See *Builder*.

Foreign Judgment.—In an action on a foreign judgment and the usual *assumpsit* counts, where the plaintiff only files a copy of the judgment which does not reveal the cause of indebtedness, he will be ordered to file an account.—*Holme v. Cassils et al.*, S. C. p. 28.

Guarantee.—An order to "give bearer what he wants" does not contain a continuing guarantee.—*Lacroix & Bulmer*, Q. B. p. 327.

Habeas Corpus.—After a prisoner is committed for trial for arson, if the depositions on which the commitment is based do not establish his guilt, he will be admitted to bail.—*Ex parte Onasakeurat, petr.*, S. C. p. 219.

Hypothecary Action.—A hypothecary action may be instituted against the direct debtor, as well as against a *tiers détenteur*, when such direct

debtor is still in possession of the property hypothecated by him.—*Lebrun v. Bédard*, S. C., p. 157.

Imperial Statute, 22 and 23 Vic. ch. 63.—Under this Statute in any case depending in any court, in any other portion of Her Majesty's Dominions, if the law applicable to the facts of the case is the law administered in any other part of Her Majesty's Dominions, and is different from the law in which the court is situate, it is competent to the court in which such action may depend to direct a case to be prepared, setting forth the facts, and to pronounce an order remitting the same for reference to the Superior Court, administering the law applicable to the facts of the case, and desiring said Court to pronounce its opinion upon the questions submitted to it. And such case is brought before the said Superior Court by petition of any of the parties to the action, praying the Court to hear the parties or their counsel, and to pronounce its opinion on the questions submitted.—*Noad v. Noad*, S. C., p. 312.

Innkeeper.—An innkeeper is responsible for the effects stolen from a traveller while lodging in his house, where it is not proved that the theft was committed by a stranger and was due to the negligence of the traveller; and the oath of the traveller is sufficient to prove the loss, as well as the value of the things stolen.—*Gerikin & Grannie*, Q. B., p. 265.

Insolvent Act.—1. A party who has for six months acquiesced in the proceedings taken against him under the Act cannot afterwards question the jurisdiction of the Court.—*Fulton v. Lefebvre, & Lefebvre*, ptr., S. C., p. 23.

2. A *capias* may lie against a defendant who has assigned under the Act.—*Robertson et al. v. Hale, & Hale*, ptr., S. C., p. 38.

3. An appeal to the Court of Queen's Bench does not lie from any judgment of the Superior Court under the Insolvent Act, which is not a final judgment.—*Mackay v. The St. Lawrence Salmon Fishing Company*, Q. B., p. 76.

4. Notwithstanding an assignment under the Act by a defendant in a suit, he may still continue to act in the suit in his own name.—*Morin v. Henderson*, S. C., p. 83.

[To be concluded in next issue.]

The Legal News.

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THE QUEEN v. SCOTT.

The Supreme Court of Canada, on the 25th of April, reversed the decision of the Court of the Queen's Bench for the Province of Quebec, in the above case, which was one that elicited considerable discussion, and on which the Provincial Court was divided. The question was whether the stealing of an unstamped promissory note from the maker is larceny. Scott stole a note from the possession of the drawers, stamped and endorsed it, and then tried to collect it. The Court of Queen's Bench (22 June, 1877) Chief Justice Dorion and Judge Sanborn dissenting, held that this was larceny, but the Supreme Court has reversed the judgment, and sustained the opinion expressed by the Chief Justice and Mr. Justice Sanborn, that a note unstamped, being null, has no value, and is not the subject of larceny. This judgment seems to be in accordance with the English decisions in which the same point has been considered.

EXTRADITION.

It is satisfactory to find the Court of Appeals of Kentucky taking the correct view of the Extradition Treaty between Great Britain and the United States, in relation to the much controverted question of the right to try surrendered fugitives for offences other than those for which their extradition was claimed. In the case of the *Commonwealth v. Hawes*, decided by the Court of Appeals on the 17th April, the surrender of Hawes had been claimed by the United States Government, while the accused was residing in London, Ontario, and he was given up by the Canadian authorities, under the treaty of 1842, to answer three charges of forgery. One of the indictments for forgery was not pressed, and the prisoner was acquitted on the others. But the prisoner was still detained in custody, and finally a day was fixed for his trial on an indictment for embezzlement. Hawes then presented an affidavit to the Court, setting out all the facts attending his surrender, and moved to set aside the returns of the Sheriff

on the various bench warrants under which he had been arrested, and to release him from custody. The Court having, in effect, sustained this motion, the Commonwealth appealed. The judgment appealed from held that the tenth article of the Treaty of 1842 impliedly prohibited the government of the United States, and the Commonwealth of Kentucky from proceeding to try Hawes for any other offence than one of those for which he had been extradited, without first affording him an opportunity to return to Canada, and that he could not lawfully be held in custody to answer a charge for which he could not be put upon trial. This decision, which embodies the point contended for by Great Britain in the recent diplomatic correspondence on the subject, has been sustained by the Court of Appeals of the State of Kentucky. It was because a different view was entertained by other courts of the Republic, that the English government declined to give up Winslow. We quote the concluding remarks of Chief Justice Lindsay, in which he replies to one of the strongest arguments adduced by those who hold a contrary opinion:

"Hawes was surrendered to the authorities of Kentucky to be tried upon three several indictments for forgery. The Canadian authorities were of opinion that the evidences of his criminality were sufficient to justify his commitment for trial on said three charges. One of the charges the Commonwealth voluntarily abandoned. He was tried upon the remaining two, and found not guilty in each case by the jury, and now stands acquitted of the crimes for which he was extradited.

"It is true he was in court, and in the actual custody of the officers of the law when it was demanded that he should be compelled to plead to the indictment for embezzlement. But the specific purposes for which the protection of the British laws had been withdrawn from him had been fully accomplished, and he claimed that, in view of that fact, the period of his extradition had been determined; that his further detention was not only unauthorized, but in violation of the stipulations of the treaty under which he was surrendered, and that the Commonwealth could not take advantage of the custody in which he was then wrongfully held, to try and punish him for a non-extraditable offense.

"To all this, it was answered that 'an offender against the justice of his country can acquire no rights by defrauding that justice.' That 'between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm.' Such is the doctrine of the cases of Caldwell and Lawrence (8th and 13th Blatchford's Reports), and of the case of Lagrave (59th New York). And if the cases of Caldwell and Lawrence could be freed from the complications arising out of the residence of the prisoners within the territorial limits of the British crown, and the fact that we received them from the authorities of the British government in virtue of, and pursuant to, treaty stipulations, it would be sound doctrine and indisputable law.

"But did Caldwell or Lawrence come within the reach of the arms of our laws? They were surrendered to us by a foreign sovereign to be tried for specified crimes, and were forcibly brought for the purposes of those trials within the jurisdiction of our courts, and the point in issue was not whether the prisoners had secured immunity by flight, but whether the court could proceed to try them without disregarding the good faith of the government, and violating the 'supreme law?'

"The legal right of a judicial tribunal to exercise jurisdiction in a given case must, from the nature of things, be open to question at some stage of the proceeding, and we find it difficult to conceive of a person charged with crime being so situated as not to be permitted to challenge the power of the court assuming the right to try and punish him.

"The doctrine of the cases of Caldwell and Lawrence has been sanctioned by several prominent British officials and lawyers, and has seemingly been acted upon by some of the Canadian courts, and in one instance (that of Heilbronn) by an English court. We say seemingly, for the reason that in Great Britain treatises are regarded as international compacts, with which in general the courts have no concern. They are to be carried into effect by the Executive, and the proceedings in the courts are subject to executive control to the extent necessary to enable it to prevent a breach of

treaty stipulation in cases of this kind. Hence, when a party charged with crime claims immunity from trial on account of the provisions of the treaty under which he has been extradited, he must apply to the Executive to interfere, through the law officers of the Crown, to stay the action of the court; otherwise it will not, at his instance, stop to inquire as to the form of his arrest, nor as to the means by which he was taken into custody.

"But a different rule prevails with us, because our government is differently organized. Neither the Federal nor State Executive could interfere to prevent or suspend the trial of Hawes. Neither the Commonwealth's Attorney nor the court was to any extent whatever subject to the direction or control either of the President of the United States or the Governor of this Commonwealth.

"But the treaty under which the alleged immunity was asserted being part of the supreme law, the court had the power, and it was its duty, if the claim was well founded, to secure to him its full benefit.

"The question we have under consideration has not been passed on by the Supreme Court of the United States, and it therefore so far remains an open one that we feel free to decide it in accordance with the results of our own investigations and reflections.

"Mr. William Beach Lawrence, in the 14th volume of the *Albany Law Journal*, at page 96, on the authority of numerous European writers, said:

"All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offenses for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies."

"This is the philosophy of the rule prevailing in France. The French Minister of Justice, in his circular of April 15, 1841, said: 'The extradition declares the offense which leads to

it, and this offense alone ought to be inquired into.'

"The rule, as stated by the German author Hefter, is, that the individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition.

"And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offenses, and when the British Parliament and the American Congress assumed to provide that the persons extradited by their respective governments should be surrendered '*to be tried for the crime of which such person shall be so accused*,' this dominant principle of modern extradition was both recognized and acted upon.

"This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders.

"Hawes placed himself under the guardianship of the British laws, by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition.

"He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through

the extradition clause of the Federal Constitution, or through the comity of a foreign government.

"But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited.

"We conclude that the court below correctly refused to try Hawes for any of the offences for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

"The order appealed from is approved and affirmed."

DIGEST OF QUEBEC DECISIONS.

[Concluded from page 204.]

Insolvent Act.

5. Where a trader carries on business in more places than one, a writ of attachment under the Act can only issue at his chief or one of his principal places of business.—*Brockville & Ottawa R. W. Co. v. Foster*, S. C., p. 107.

6. The return day of a writ of attachment under the Act must not be later than five days after service of the writ.—*Id.*

7. An order obtained by a creditor for the delivery of goods, by fraud and artifice, will be set aside on petition of the assignee.—*In re Cable*, ins., & *Stewart*, assignee, & *Bayard*, petr., &c., S. C., p. 121.

8. Where a composition deed provides that the insolvent shall be entitled to a re-conveyance of his estate, on placing in the hands of the assignee notes covering the composition, and the assignee has re-conveyed the estate without receiving a note for a creditor who had filed a claim, the Court will order the assignee to deliver such note to such creditor.—*In re Murray*, ins., & *Stewart*, assignee, & *Auerbach*, petr., S. C., p. 123.

9. An insolvent is not bound to answer a question which may tend to criminate him.—*In re Beaudry & Wilkes*, petr., S. C., p. 196.

10. Where an attachment has been issued under the Act and the defendant has petitioned to quash within the five days, the plaintiff cannot discontinue his attachment, and the

defendant has a right (notwithstanding such discontinuance) to a judgment on his petition.—*Ford v. Short*, S. C., p. 198.

11. An insolvent cannot stay the proceedings of a plaintiff, until the assignee take up the instance in place of the insolvent.—*Wilson et al. v. Brunet*, C. R., p. 209.

12. A debtor who, having failed to meet his liabilities, gives accommodation notes, knowing his insolvency, and buys goods on credit, without disclosing these facts to the vendor, commits a fraud within the meaning of the Act, and is liable to be imprisoned accordingly.—*Watson et al. v. Grant*, S. C., p. 222.

13. The provisions of sec. 14 of the Act do not apply to a creditor who desires to attack the validity of an attachment under the Act, on the ground that his debtor (the insolvent) is not really a trader within the meaning of the Act, and that he is moreover not really insolvent, and, therefore, such creditor may intervene at any time and contest the proceedings, and, in so doing, he does not require to allege that he is an unsecured creditor for an amount exceeding \$100.—*Langevin & Grothé et al.* Q. B., p. 237.

14. "The Court" in section 136 of the Act of 1875, in the Province of Quebec, means the Superior Court, and not the Judge sitting in insolvency, and the demand for the imprisonment of the debtor provided by said section is made in an ordinary suit and not by a petition in insolvency.—*In re Gear*, ins., & *Sinclair*, assignee, & *Furniss*, petr., S. C., p. 279.

15. A demand of assignment under the Act will be set aside, unless it be distinctly proved that the defendant has failed to meet his liabilities generally as they become due.—*Beard v. Thomson*, & *Thomson*, petr., C. R., p. 299.

16. The privilege for wages due to journeymen does not extend to the proceeds of the sale of book debts, but is limited to the merchandise and effects contained in the store or workshop in which their services were required.—*In re Beaulieu*, insolvent, & *Dupuy*, assignee, & *Beaulieu et al.*, petr., C. R., p. 304.

17. The demand, under sec. 39 of the Act of 1875, must be made within the four days after the return of the writ, and seems to cover every species of demand.—*Cartier v. Germain*, S. C., p. 310.

See *Married Woman*.

Inscription en Faux.—The correctness of a duly certified copy of a notarial act may be attacked otherwise than by an inscription *en faux*, and, therefore, the procedure by way of such inscription is unnecessary and ought to be rejected.—*Dufresne et al. v. Lalonde et al.*, S. C., p. 105.

Insurance.—1. Where the assured, in his application, described the building to be insured as "isolated," the mere fact that this word was explained in a printed note below the assured's signature to mean at a distance of 100 feet from the building, and that the building was not at that distance, would not invalidate the insurance in the absence of proof that the assured knew of this explanation at the time he signed the application.—*Pacaud & The Queen Insurance Co.*, Q. B., p. 111.

2. Mere over-valuation will not of itself, in the absence of proof of bad faith, invalidate the policy.—*Ib.*

3. The condition in a fire policy, that the assured shall give notice and make proof of loss before any suit can be brought on the policy, is not complied with by a third person to whom the loss is made payable furnishing such notice and proof of loss; and, in the absence of any such notice and proof of loss by the assured himself, the action by such third person will be dismissed.—*Stanton v. The Home Fire Insurance Co.*, p. 211.

4. An insurance by an assignee under a deed of assignment under the Insolvent Act will not enure to the benefit of an assignee subsequently elected by the creditors, without the consent of the insurance company, where the policy contains the following clause or condition:—"If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance; or if the policy shall be assigned before a loss, without the consent of the company endorsed thereon, etc., then and in every such case the policy shall be void."—*Elliot v. The National Ins. Co.*, S. C., p. 242.

5. Where it is impossible for the assured to give a detailed statement under oath of his loss, supported by books and vouchers, owing to their being burnt, the condition of the policy requiring such statement will be satisfied by his giving affidavits as to the value of the

property lost.—*Perry v. The Niagara District Mutual Fire Ins. Co.*, S. C., p. 257.

6. An insurance of goods described as being in No. 319 St. Paul street will be held to cover the same goods, although removed into the premises No. 315 adjoining, if the agent of the insurance company, at the end of the first year of the insurance, examined the premises and consented to a renewal of the policy; and such a variation does not constitute a new contract, but only a slight change in the old contract approved of by the parties.—*Rolland v. The Citizens Ins. Co.*, C. R., p. 262.

7. The question as to the consent of the company to a change of the location of the goods insured, is a matter of fact properly left to the jury.—*Ib.*

8. An agent of an insurance company, whose powers are limited to receiving applications for insurance for transmission to the head office and for the collecting of premiums, has no power to waive any of the conditions of the policies.—*Baillie v. The Provincial Ins. Co. of Canada*, C. R., p. 274.

9. The condition in a policy to the effect that all persons insured shall, as soon after the loss by fire as possible, deliver in a particular account of such loss or damage, signed with their own hand and verified by oath or affirmation, is waived by the fact of the agent of the company and the person insured each choosing valuers who make a valuation of the loss, and by the fact of the company offering the insured a less amount than the valuation in settlement, showing that they only disputed as to the amount to be paid.—*Converse v. The Provincial Ins. Co. of Canada*, C. R., p. 276.

Interest.—1. In a commercial case, where interest has been charged in accounts current rendered from time to time and unobjected to, the Court will allow the interest without any proof of express promise to pay it.—*Greenshields v. Wyman et al.*, S. C., p. 40.

2. Arrears of interest on an obligation entered into before the Civil Code came into force, accrued since the date of the Code, are prescriptible by five years as provided by the Code.—*Smallwood v. Allaire*, C. R., p. 106.

See Prescription.

Judgment.—1. The draft of a judgment as paraphrased by the judge, is the true record of such judgment, and cannot be contradicted by

verbal evidence offered in support of a *requête civile* attacking the correctness of the entries thereon so paraphrased by the judge.—*Carter v. Molson, & Holmes*, int. party, S. C., p. 210.

2. A judgment so recorded, cannot be set aside, on a *requête civile* by another judge of the same court, on the ground of error in such record.—*Ib.*

Judicial Sale.—It is necessary that more than one person bid to make the sale valid.—*Poirier v. Plouffe, & Calvi*, oppt., S. C., p. 103.

Jurisdiction.—1. Where a party endorses a note after it is due, with the fraudulent intent thereby to attempt to force the other parties to the note to answer in a suit on the note at the place of the domicile of such endorser where he is served with process, the Court will dismiss an action brought under such circumstances, *quoad* such other parties.—*Wilkes v. Marchand et al.*, S. C., p. 118.

2. The Circuit Court has jurisdiction in a case to rescind a lease where the amount of damages laid is within the jurisdiction of the C. C., although the yearly rent stipulated in the lease is in excess of the amount for which an ordinary suit might be brought in that court.—*Choquet v. Hart*, C. C., p. 305.

See Cause of Action; Security for costs.

Jury Trial.—*See Privy Council.*

Larceny.—An unstamped promise to pay is a valuable security, and, even in the hands of the maker, is such property as to be the subject of larceny.—*Regina v. Scott*, Q. B., p. 225.

Licence Act.—An applicant for a writ of *certiorari* to remove a conviction for violation of the Act is required to make the deposit provided for by s. 195 of the 34th Vic. ch. 2, before he can make the application.—*Ex parte McCambridge, petr., & Desnoyers*, Police Magistrate, & *Bellemare*, pros., S. C., p. 181.

Lottery.—*See Tirage au Sort.*

Latent Defect.—An imperfect wooden drain, connecting the water closets and drains of a house with the common sewer in the street of a city, is a latent defect against which the seller is obliged by law to warrant the buyer, when, from the character of the house, the buyer had reason to believe that the drains were constructed in a proper manner.—*Ibbotson & Ouimet*, Q. B., p. 53.

Lessor.—1. The lessor has a right, in suing his tenant for rent due, to seize all the move-

ables in the leased premises, notwithstanding that they may be in the possession of an assignee under the Insolvent Act of a sub-tenant, not accepted as such by the lessor.—*Boyer v. McIver, & Craig*, int. party, S. C., p. 160.

2. The mere receipt by the lessor of several instalments of rent due by his tenant from the sub-tenant does not create novation of the lessor's claim against his tenant.—*Ib.*

Lessor and Lessee.—See *Jurisdiction*.

Letters Patent.—A company may be incorporated by letters patent for the purposes of navigation within the limits of this Province, under the Provincial Statute.—*Macdougall et al. & The Union Navigation Co.*, Q. B., p. 63.

Mandamus.—1. A writ of mandamus does not lie to compel a Railway Company to deposit an amount awarded for expropriation by arbitrators.—*Bourgouin v. The Montreal, Ottawa & Occidental R. Co.*, S. C., p. 217.

2. A writ of mandamus will lie against the City of Montreal to compel the appointment of commissioners to fix the amount of indemnity to be paid to the owners of property affected by the change of level of a street, although no grade for such street had been formally determined previously.—*Joseph v. The City of Montreal*, S. C., p. 232.

Marriage Contract.—In the case of a donation under a marriage contract from the husband to the wife, of a sum of money to be applied to the purchase of household furniture for their joint use, the death of the husband before the donation was so applied, does not exempt the husband's estate from liability for the amount thereof.—*Symons v. Kelly et al.*, S. C., p. 257.

Married Persons.—See *Practice*.

Married Woman.—1. A married woman, separated as to property, and becoming security for her husband, has a right to recover back, with interest from the date of service of process, an amount paid by her as such security.—*Buckley & Brunelle et vir*, Q. B., p. 133.

2. A married woman separated as to property, is not liable for groceries consumed in the house in which she and her husband live, when they have not been purchased by her or on her order, and have been charged in the merchant's books to the husband.—*Larose v. Michaud et vir*, C. C., p. 167.

3. The principle of the law Quintus Mucius, by which acquisitions made by a married

woman were presumed to have been paid with the money of the husband until proof to the contrary, is applicable to the Province of Quebec.—*In re Plessis dit Belair et al.*, ins., & *Fair*, assignee, & *Landerman*, petr., S. C., p. 197.

4. A married woman, who with her husband makes a donation of a sum of money to one of their children, whilst *en communauté de biens* with her husband, remains liable for one half of the donation, notwithstanding she be subsequently separated judicially from her husband as to property, and renounce to the community.—*Vincent et ux. v. Benoit et vir*, S. C., p. 218.

5. The property of a married woman will not be made liable for necessities supplied to the family without proof of the insolvency of the husband.—*Laframboise et al. v. Lajoie, & Lauzon et vir*, oppts., C. C., p. 233.

6. If the husband is without means, the creditors may claim from the wife payment of household debts for necessities supplied after the husband's insolvency.—*McGibbon et al. v. Morse et vir*, C. C., p. 311.

Montreal, City of.—See *Mandamus*.

Municipal Code.—The Municipal Code has not totally abrogated the provisions of The Temperance Act of 1864. *Exp. Sauvé & The Corporation of the County of Argenteuil.*—C. C., p. 119.

See *Practice*.

Navigation.—See *Letters Patent*.

Novation.—See *Lessor*.

Opposition afin de distraire.—1. An opposition *afin de distraire* cannot be filed by a person who has made himself voluntary guardian to a *saisie-gagerie* of the effects claimed, and allowed judgment to go without opposition, declaring the *saisie* good and valid.—*Poirier v. Plouffe, & Calvi*, opposant, S. C., p. 103.

2. A document not alleged in an opposition *afin de distraire* and not produced at the filing of the opposition, cannot be produced and filed later.—*Ib.*

3. An opposition *afin de distraire* to a seizure of moveables, seized in the possession of the party condemned, will be dismissed on motion, if the allegations fail to set out any specific title and do not set up a possession in the opposants.—*Duhamel et al., v. Duclos & Duclos, T. S. & Perreault et vir*, opposants, S. C., p. 308.

Partnership.—1. When a registered partnership has been dissolved, without registration of

the dissolution, and without notice thereof to the creditor, service of process on one of the partners at the place of business of the late firm is good against all the co-partners.—*Green-shields v. Wyman et al.*, S. C., p. 40.

2. An association of persons, formed for the purpose of trafficking in real estate, is not a commercial partnership.—*Girard & Trudel et al.*, Q. B., p. 295.

Peremption.—*Pour parlers* for the compromise of a case are of a nature to interrupt, but the proof thereof can only be made by writings.—*Phaneuf v. Elliott*, S. C., p. 221.

Perjury.—The crime of perjury cannot be assigned upon a deposition under 284, C. P., where the consent in writing required by that article has been omitted.—*Regina v. Martin*, Q. B., p. 156.

Pledge.—A clerk and salesman of a commercial firm cannot legally pledge the goods of his employers, which he has stolen, for monies borrowed in his own individual name and loaned to him in good faith, on the security of the goods so stolen, and of which he was apparently in open possession as proprietor.—*Cassils et al.*, & *Crawford et al.*, Q. B., p. 1.

2. Where a pledged watch has been stolen from the party to whom it was pledged, without any fault or negligence on his part, he is not liable to make good the loss.—*Soulter v. Lazarus*, C. S., p. 104.

3. The *actio pignoratitia directa* does not lie, when the pledgee is allowed to sell or dispose of the thing pledged, by the very terms of the written instrument of pledge.—*Dempsey v. MacDougall et al.*, S. C., p. 328.

Power of Attorney.—Where the power of Attorney is not filed before the *exception dilatoire* claiming it, costs will be awarded on the exception.—*Westcott et vir v. Archambault et al.*, S. C., p. 307.

See *Agent*.

Practice.—1. A replication to a general answer is unnecessary, and will be rejected on motion.—*Fauteux v. Parent*, S. C., p. 12.

2. The "one day" referred to in 74 C. P., with reference to the service of summons in suits between lessors and lessees, must not be a *dies non*.—*Metayer dit St. Onge v. Larichelière*, S. C., p. 27.

3. A surveyor cannot prevent the opening of

his report, unless a sum he chooses to name be first paid.—*Décary v. Poirier*, S. C., p. 27.

4. The Court of Review has no power to revise a judgment on a petition to revise a bill of costs.—*Ryan v. Devlin*, C. R., p. 28.

5. In a plea to an action of damages, where a defendant specially denies, and in the same plea alleges, affirmative matter, which is not a justification, such matter will be struck out on motion of plaintiff.—*St. Jean v. Bleau*, S. C., p. 37.

6. In a district where there is no rule of practice fixing the hours of opening and closing the Prothonotary's office, but where the office was usually closed at 4 p. m., an exception *à la forme* left with the Prothonotary at his office between the hours of 4 and 5 p. m. was properly filed.—*The Carillon & Grenville R. Co. & Burch*, Q. B., p. 46.

7. The death of one of plaintiff's attorneys does not invalidate proceedings had in the case as if both were still such attorneys; the plaintiff being in such case really represented by the surviving attorney.—*Morin v. Henderson*, S. C., p. 83.

8. A report of collocation may be contested, by permission of the Court, and on special cause shown, after the delay of six days, if no proceeding to homologate the report has been adopted.—*Deladurantaye v. Posé & Lacroix et al.*, contesting, S. C., p. 100.

9. Where leave was granted to appeal to the Privy Council, and the appellant filed a consent that the judgment should be executed, and at the same time a City of Montreal Debenture was deposited with the Clerk of the Court as security for the costs of the appeal, the seizure of such bond in execution of the judgment will not prevent the Court from accepting it as a security.—*Jetté et al. & McNaughton*, Q. B., p. 192.

10. A plaintiff who seizes, as belonging to his debtor, real property which has been registered for some years in the name of another person, shall pay the costs of opposition which such person has been obliged to file to prevent the sale of his property.—*Robert et al. v. Fortin & La Société de Construction Jacques Cartier*, opposants, S. C., p. 219.

11. Where a bailiff, resident in another district, and charged with the execution there of a writ of execution issued out of the district of

Montreal, fails to comply with the exigencies of the writ, he is liable to imprisonment in the District of Montreal.—*Gnaedinger et al. v. Derouin et al.*, S. C., p. 220.

12. It is not necessary that the prisoner should be present at the hearing of a reserved case.—*Regina v. Glass et al.*, Q. B., p. 245.

13. A special answer, to which no replication has been filed within the eight days, may nevertheless be attacked by motion, and certain allegations therein struck out in accordance with such motion.—*Delbar v. Landa*, S. C., p. 247.

14. The City of Montreal will not be compelled to dispossess itself of documents forming part of the archives of the city, in order that the same may be filed as evidence in a cause.—*Cramp & The Mayor et al., of Montreal*, Q. B., p. 249.

15. When a husband and wife (separated as to property), are sued jointly and severally, a copy of the writ and declaration must be served on each of them.—*Dansereau v. Archambault et al.*, S. C., p. 302.

16. A bailiff may be sued for damages resulting from errors in his return, and cannot claim the preliminary notice of action provided by 22 C. P.—*Major v. Chartrand*, C. C., p. 303.

17. A bailiff is not a public officer entitled to notice of action under 22 C. P.—*Major v. Boucher*, C. C., p. 304.

18. An affidavit to an opposition in the Circuit Court may be sworn before a commissioner of the Supreme Court, and the prefix "Commissaire C. S." is sufficient, even when the affidavit is made out of the district in which the opposition is filed.—*Wood v. Ste. Marie, & Ste. Marie*, opposant, C. C., p. 306.

19. The service of a petition by a party not in the cause on the attorneys of the plaintiff who obtained the judgment condemning the *tiers saisi* to pay plaintiff a certain sum of money, asking for a special order to prevent said *tiers saisi* paying over the amount, is bad.—*Booth v. Lacroix et al., & Rolland, T. S., & Dupuy, petr.*, S. C., p. 307.

See *Saisie-Conservatoire*; *Capias ad Respondendum*; *Foreign Judgment*; *Experts*; *Enquête*; *Partnership*; *Costs*, *Security for*; *Absentee*; *Requête Civile*; *Appeal*; *Insolvent Act*; *Cause of Action*; *Opposition à fin de distraire*; *Judicial Sale*; *Inscription en faux*; *Contrainte par Corps*;

License Act; *Congé défaut*; *Judgment*; *Prescription*; *Mandamus*; *Habeas Corpus*; *Peremption*; *Adjudicataire*; *Election*; *Saisie-arêt*; *Aveu Judiciaire*; *Jurisdiction*; *Power of Attorney*; *Affidavit*; *Privy Council*.

Prescription.—1. The short prescription provided by articles 2250, 2260, 2261 and 2262 C. C., is liable to be renounced and interrupted, in the manner prescribed by art. 2227.—*Walker & Sweet*, Q. B., p. 29.

2. A loan of money by a non-trader to a commercial firm is not a "commercial matter," or a debt of a "commercial nature," and is not, therefore, prescriptible by the lapse of either 6 or 5 years.—*Darling & Brown et al.*, Q. B. p. 92, & *Supreme Court*, p. 169.

3. The prescription of 5 years under the Code against arrears of interest cannot be invoked in respect of debt due prior to the coming into force of the Code.—*Ib.*

4. The transmission of an unsigned account in a letter signed by the debtor takes the case out of the Statute, ch. 67 C. S. L. C., *Darling & Brown et al.*, S. C., p. 169.

5. In an action for damages resulting from a *quasi délit*, instituted more than two years after the wrong complained of occurred, the court must dismiss the action, in the absence even of a plea of prescription.—*Grenier v. The City of Montreal*, S. C., p. 215.

6. The municipal taxes of the City of Montreal are only prescriptible by the lapse of 30 years.—*Guy v. Normandeau*, S. C., p. 300.

See *Interest*.

Priest.—A priest who defames the character of a person in his sermon is liable to be sued in damages.—*Vigneau v. Rev. Messire Joseph Noiseau*, S. C., p. 89.

Privy Council.—An appeal to the P. C. will be allowed by Her Majesty, in the case of a judgment of the Court of Q. B. setting aside the verdict of a special jury and ordering a new trial, even when such appeal has been refused by the Court of Q. B., on the ground that an appeal to the P. C. does not lie in such cases.—*Lambkin & The South Eastern R. Co.*, P. C., p. 325.

Promissory Note.—1. An action on a note not filed, will be dismissed.—*Hudon & Girouard*, Q. B., p. 15.

2. By granting delay to the maker and first endorser of a note, without the consent of the

second endorser, the holder's recourse against such second endorser is lost.—*Desrosiers v. Guérin*, S. C., p. 96.

3. A note signed by a person carrying on business as a grocer, to whom a judicial adviser has been appointed, without the assistance of such adviser, for goods sold and delivered to him as such grocer, is valid.—*Delisle v. Valade*, S. C., p. 250.

4. A note given to a creditor to induce him to sign a deed of composition, or the note given in renewal of such note, is null, and the nullity may be pleaded by the maker to an action by the creditor.—*MacDonald v. Senes*, S. C., p. 290.

5. A note given either by an insolvent or by a creditor to induce the payee to consent to the insolvent's discharge is null.—*Decelles v. Bertrand*, C. R., p. 291.

See *Larceny*.

Railway Ticket.—The holder of a railway ticket travelling from Montreal to Toronto, and marked—"Good only for continuous trip within two days from date"—and who leaves the train in which he starts at Kingston, where he remains several days, cannot afterwards avail himself of the ticket in payment of a trip on another train from Kingston to Toronto.—*Livingston v. The Grand Trunk R. Co.*, C. R., p. 13.

Redhibitory Vice.—See *Exchange*.

Registrar's Certificate.—See *Trouble*.

Requête Civile.—A *requête civile* which does not on its face come within the provisions of art. 505, C. P., may be rejected on motion.—*MacDougall et al. & The Union Navigation Company*, Q. B., p. 63.

See *Judgment*.

Reserved Case.—See *Practice*.

Review, Court of.—See *Practice*.

Saisie Arrêt.—The omission to allege in an affidavit for *saisie arrêt*, that the defendant "is secreting" his property, or (in the case of a trader alleged to be insolvent) "that he still carries on his business," is fatal.—*Osborn et al v. Nitsch, & Nitsch, petr.*, S. C., p. 252.

Saisie Conservatoire.—In an action claiming a resolution of a sale of moveables by the unpaid vendor, the plaintiff has a right to attach the property by a *saisie conservatoire*, and, although the attachment may be in the nature of a *saisie revendication*, it will nevertheless avail to him as

a *saisie conservatoire*.—*Henderson & Tremblay*, Q. B., p. 24.

Sale.—1. The remedy of a purchaser of real estate in case of deficiency of quantity in the land sold is not in damages, but to claim either a diminution of the price or the revocation of the sale.—*Doutney v. Bruyère et al.*, S. C., p. 59.

2. A purchaser of real estate cannot seek to recover back a part of the price paid by him, or claim security from the vendor on the ground that he has just cause to apprehend being troubled in his possession, nor can he refuse to pay interest on the balance of the capital due by him.—*Hogan et al. v. Bernier*, S. C., p. 101.

See *Latent Defect*; *Trade Mark*; *Trouble*; *Unpaid Vendor*.

Séparation de Corps.—In an action of *séparation de corps* for adultery, the defendant cannot plead in bar acts of adultery on the part of the plaintiff.—*Brennan v. McAnnally*, S. C., p. 301.

Shareholder.—See *Calls*.

Sheriff.—See *Adjudicataire*.

Sheriff's Sale.—In the case of a sale by the Sheriff of an immoveable which by a donation was substituted, the purchaser is justified in claiming to be relieved from the sale, notwithstanding that the donor, by a second donation to the same donee, makes no mention of any substitution, and such relief may be claimed, by an answer to a rule against him for *folle enchère*.—*Jobin & Shuter et vir.*, Q. B., p. 67.

Signification.—See *Transfer*.

Stamps.—See *Bon*.

Stolen Goods.—See *Pledge*.

Substitution.—See *Sheriff's Sale*.

Summons, Service of, on Married Persons.—See *Practices*.

Supreme Court.—See *Appeal*.

Surveyor.—See *Practices*.

Tax.—See *Insurance*.

Temperance Act of 1864.—1. The provisions of this Act have not been repealed or amended by the Municipal Code or subsequent legislation, so as to prevent the enactment of a by-law thereunder for the prohibition of the sale of spirituous liquors.—*Ex parte Cooley, Jr., & The Municipality of the County of Brome*, C.C., p. 182.

2. The regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada.—*Ib.*

See *Municipal Code*.

Tirage au Sort.—A *tirage au sort* by a building

society, providing for a distribution of lots of land among its members, is not a lottery within the meaning of Ch. 95 of the Consolidated Statutes of Canada, or article 1927 of the C. C.—*La Société de Construction du Coteau St. Louis v. Villeneuve*, C. C., p. 309.

Transfer.—The non-signification of a transfer cannot be the subject matter of an appeal from a judgment in an *ex parte* case.—*Stanley & Hanlon*, Q. B., p. 75.

Tripartite Community of Property.—1. A tripartite community is dissolved by the death of the second wife who dies without leaving any minor children, and therefore the third share of the second wife is an immoveable purchased during the existence of such tripartite community is a *propre* of the issue of such second marriage.—*Francaeur & Mathieu*, Q. B., p. 288.

2. The surviving husband has no power to alienate such immoveable after the death of the second wife.—*Ib.*

3. The purchaser of the rights of said issue, of age at the death of the mother, has a right to obtain a *partage* of said immoveable.—*Ib.*

Trouble.—The production of a registrar's certificate showing that mortgages are registered against a property purchased, which mortgages do not appear to have been discharged, is sufficient to support a plea of fear of trouble under art. 1535, C. C., and in such case the balance of purchase money which the buyer has yet to pay on the property, is the only amount for which he can claim security.—*Parker v. Felton*, Q. B., p. 253.

Unpaid Vendor.—1. The unpaid vendor of moveables has a right under art. 1543, C. C., to demand the resolution of the sale, under the circumstances stated in that article, even after the expiration of the eight days allowed for revendication by art. 1998.—*Henderson & Tremblay*, Q. B., p. 24.

2. The 82nd section of the Insolvent Act has not taken away the right of the vendor to revendicate goods sold by him to the insolvent, and the price whereof has not been paid.—*In re Hatchette et al., & Gooderham et al.*, S. C., p. 165.

3. The vendor of real property has a right to sue the purchaser for the price, notwithstanding that by the deed of sale the payment of such price was delegated in favor of a third party, so long as the delegation is not accepted.—*Mallette et al. v. Hudon*, S. C., p. 199.

Usufructuary.—A usufructuary has no power to sell all the sand that can be removed during five years from the land of which he has the usufruct; such a sale being equivalent to a sale of the land itself.—*Dufresne v. Bulmer*, S. C., p. 98.

Wages.—See *Insolvent Act*.

Wills.—1. The registration of a will creating substitution, after the six months following the death of the testator, is good as against all persons acquiring right since.—*Dufresne v. Bulmer*, S. C., p. 98.

2. Legal questions arising out of the construction of the terms of a will are regulated by the laws of the domicile of the testator where he makes his will.—*Noad v. Noad*, S. C., p. 313.

3. Under a clause in a will worded as follows, the legatee is simply a fiduciary legatee or trustee such as specified in Art. 869, C. C.:—"I hereby give and bequeath unto my brother, William S. Noad, \$3,000, which said sum I hereby direct to be invested by my executors in U. S. Government bonds, bearing interest, and the said bonds to be issued in his name and to be forwarded to him, to be used for the support of his family." But in the absence of fraud or collusion, the depositary of such bonds or their proceeds (even though he knew the nature of the trust and the terms of the will) would be free of all responsibility or liability on returning the same on the order of the trustees.—*Ib.*

THE TOOLS OF THE LEGAL TRADE, AND HOW TO CHOOSE THEM.

[Continued from p. 199.]

In former times it was the function of a preface to impart to the reader some correct idea of the book to which it is prefixed. And, even at the present day, we have among authors more or less "old fogies" who cleave to the old plan. At what precise date the new method came into being, or by whom it was originated, I do not know. It seems to work admirably, and, as far as I can judge, it gains daily in popularity. Some three years ago, if my recollection serves me, and I write only from memory, there were two law journals—possibly more—whose editors put in a protest against carrying the plan so far as to reprint an English book with an altered title-page, if

thereby the American reader will be led to believe it to be some book other than it is. But their protest was unavailing; and the plan, carried even to this extent, appears now to be established as entirely just and proper.

Yet I cannot doubt that what seems at first to work so well will be found in the end not profitable. The real, inner merit of the new plan—that for which considerate men will praise it—is that it tends to harden soft brains in our profession, and to open blind eyes. But, when the brains are hardened and the eyes are opened, there will be no more use for the “tool.” It becomes like the stick which guided upward the expired rocket. And, when the fireworks are thus over for the season, the shop of the pyrotechnist will of necessity be closed.

The number of cases or the original date of a reprint, or the fidelity of its title-page to the original, or a question like that of drawing cases from *The Chum Cud*, is not the only thing to be considered in comparing together the preface and the book. For instance, I take into my hands a book, not the first edition. The author, in his preface to this edition, speaks of additions to it, and describes them as “large” and “new.” A collating of it with the prior edition shows that truly there are additions, and they are “large,” precisely as claimed. Are they “new?” A thought occurring to us, we collate the matter not in the old edition with two “new” books by other authors. Here we find nearly all of it so accurately transferred as to lead to the surmise that the type-setters had printed copy to guide them. A part of the additions are more or less distinctly—some quite distinctly, others not—credited to these authors; the rest is not credited. Both of the books bear the copyright impress; hence, of course, the copying from them was by permission. Hence, also, the additions, being taken from “new” books, are “new.” The result is that the preface, as in the other instances, is borne out by the ascertained facts; yet, as in the other instances, it practically misleads readers not educated to be sharp. The latter class would infer that the author, instead of transferring matter from the “new” works of other authors, had made “large” additions from his own more valuable stores.

These illustrations of the varying sorts of preface in books to be used as tools for harden-

ing brains and opening eyes are all for which I have room, but they do not exhaust the subject.

If the preface happens to be an old-fashioned one, it will help us in the examination of the book itself, to which we now proceed.

Though no question should arise as to any variance between preface and book, and though the book should be one in which we do not expect to find all the cases, still, for various other reasons, it may be important to see how fully they are collected, or with what discrimination the citations are made. This investigation can be conducted by the methods already described.

I now open a book, in the preface of which I do not discover any infusion of new blood demanding notice. Proceeding, therefore, directly to the book itself, our first enquiry is whether it is a digest under the name of treatise, or truly a treatise, as its title-page declares it to be. Not much examination is required to determine that it is true to its title—it is a treatise. This enquiry was important; because, though a digest may be either a good book or a worthless one, according to the manner and accuracy of its execution, and so may be a treatise, and each sort of book is desirable in its place, yet, as their objects differ, so also do the canons of criticism applicable to them.

But, before we proceed further, we must administer to ourselves a caution. The author of a treatise is a teacher; we who examine his work are his pupils. It is no stretch of modesty, therefore, to assume that, on his particular subject—how it may be on other subjects is of no consequence—he is, beyond comparison, our superior in knowledge. I am speaking of ourselves—of us who are considering whether or not to part with our hard-earned money for the book, to be used by us—not to be lent, but used personally—as a tool in our trade of practising lawyer. Of course, if we were merely writing a criticism for the guidance of others, we should know immeasurably more than the author on his subject, as well as on every other. But we, who are on more serious business, are to consider that the author carefully examined his subject, in all its parts, in connection with the authorities, before he began to write; that, besides mastering the authorities, he looked down through all the principles to the very bottom layer; and, in writing, he still further

perfected his examinations both of authorities and principles, stating his conclusions in forms to be enduring. When, therefore, he says something contrary to our prior ideas, we do not instantly condemn it, but institute a careful examination, to see whether, after all, we were not mistaken. With this caution, let us proceed.

Of prime importance in a treatise is the ability, in its author, accurately to discern the multitudinous distinctions in the law, and to state them with unvarying precision. How stands the work before us under this head?

The author commences by enumerating four causes which, he says, have "recently" revolutionized much of the doctrine of his subject—hence the necessity for his book. As we cannot examine everything, let us begin by seeing with what discrimination and accuracy of statement he deals with one of them. It is, in his own words, "the relinquishment, by England and the United States, of the maxim that the place of the commission of a crime has exclusive jurisdiction of its punishment, and the extension of such jurisdiction, with certain limitations, to the country of arrest." The connection in which this sentence stands, and the use of the word "country," not county, in the closing part of it, show that the author is treating of the question as between two nations—not of the venue, where no inter-state question arises. And we are startled by the statement, not by way of imparting information, but as of a fact known to all, that, within certain limits, we, if we can catch an Englishman who has committed an offence in his own country, may punish him for it, and the British Government may do the like with an American; the two nations having relinquished "the maxim that the place of the commission of a crime has exclusive jurisdiction of its punishment." And this has been done "recently." And it is one-quarter of the reason why a new book was needed. Well, as the author knows better than we, of course the presumption is overwhelming that he is right. So, let us proceed. Further over we shall come to the treaties or statutes by which this has been effected, or to the decisions in which the courts of the two countries have abandoned *stare decisis*, and announced the new laws. But, no; reading on we find that

there is claimed to be no such doctrine; it is this: "In criminal cases the country of arrest has jurisdiction over all offences committed against the laws of such country, with the limitation that, as to offences committed in foreign countries, such country of arrest has jurisdiction only of offences committed against its sovereignty." We see no very great objection to this statement, which is a different thing from the other; but we look in vain for the authorities to show that the doctrine is, as one of international or inter-state law, "recent." In England and the United States there have been, at different periods, some changes as to the place of trial, or the tribunal; but these are local questions, having nothing to do with international relations. Nor, as to these, are we informed of anything special and "recent." Yet the assumed "recent" change is one of the four reasons for writing the book!

A single instance of the want of accuracy, or of stating a doctrine in two conflicting forms, should not condemn a book, for probably no author ever wrote much without committing some slip of the sort. Yet, when we find that the very motive for writing is the assumed existence of what does not exist, and of what with him is one thing on one page and another thing on another, we are put fairly on enquiry concerning his performance. We do not even for this reject it, but look into it further.

Turning over the pages, we come to a chapter largely occupied with showing that, should a certain question of law, assumed not to have been directly adjudged, be presented hereafter to the courts, it ought, in just reason and established principle, and in harmony with decisions already made, to be decided in a way mentioned. Looking into the authorities, we find that this exact question has been frequently adjudged, that there neither is nor ever was any real dispute about it, and that the decision is directly the reverse of what our author says it should, and probably will be. And we note that, to sustain his erroneous proposition, he actually cites and even states some of the cases which support the contrary, apparently not aware of their effect. I have not room here to explain the matter fully, but, in brief, it is as follows:

[To be continued.]

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LETTERS OF MARQUE.

The apprehension of a war between England and Russia has attracted some attention to the present state of the law relating to letters of marque and privateering. The question has been asked with considerable anxiety, whether, in the event of a war between these powers, the United States might not be made the base for a naval war upon English commerce, as destructive as the war made by the Alabama upon American commerce. In a letter addressed to the *Times*, "Senex" endeavours to allay any apprehension of this kind, and remarks: "In fact, no such letters of marque have been issued or accepted by neutrals in the present century. The Government of the United States was the first to condemn and repudiate the practice. In 1854 the British Government intimated to Mr. Marcy, then American Secretary of State, that it entertained the confident hope that no privateer, under Russian colours, should be equipped, or victualled, or admitted with its prizes in the ports of the United States; and also that the citizens of the United States should rigorously abstain from taking part in armaments of this nature."

Sir Samuel Baker, in a later communication, referring to the statement of "Senex," suggests that should England become involved in war with Russia, it would be desirable that a special understanding on the subject of letters of marque should be renewed with the United States.

But "Amicus," a third correspondent, points out that Sir Samuel Baker has overlooked the existence of the Washington Treaty, made between England and the United States in 1871, which covers the very point under discussion. "Before that treaty," he observes, "it would have been possible for Americans to sail with impunity from American ports and destroy English merchant ships, and the English fleet would have had the difficult task of watching the long lines of the Atlantic

and Pacific coasts to prevent it. If the proceeding had excited remonstrance from England, the Washington Cabinet could only have found it necessary to cite the letters of Lord Russell to Mr. Adams, in which his lordship showed how difficult it was, under the municipal laws of a free country, to prevent Mr. Davis building privateers in the docks at Birkenhead, and how impossible it was for a free country to amend its municipal laws at the bidding of a foreign Power. It was to put an end to this that the Washington Treaty was made. That treaty was assailed by a powerful opposition in the United States. Nothing but the resolute nature of General Grant, his fixed purpose to do away with the last vestige of misunderstanding with Great Britain, and his exceptional strength at the time, new to the Presidency, and with a large majority of his party in Congress, secured the American acceptance of the treaty. The most attractive argument against the acceptance was that in the event of just such a case as is now threatened, America would lose her 'revenge.' By that treaty the two countries made themselves responsible for the escape of any unfriendly armed vessel, and for all the consequences of the escape. As it now stands, no American can sail from an American port as a Russian privateer without being regarded as a pirate. If your correspondents will study the terms of the Washington Treaty, they will find that the contingency they fear—the contingency of American-built Alabamas destroying English ships—has been provided against by rules as stringent as it is possible for diplomacy to make them. The value of that much-censured treaty will be seen, should there unhappily be war between Great Britain and Russia. All Englishmen and all Americans who value the development of Anglo-Saxon civilisation, will regard the Washington Treaty, denounced in the United States with so much vehemence by the opponents of General Grant and in Great Britain with no less vehemence by the opponents of Mr. Gladstone, as among the noblest contributions of far-seeing statesmanship towards the peace, the honour, and the security of the Anglo-Saxon world."

This is a pleasant prediction, and everybody will sincerely hope that it may be verified should England unfortunately be forced to

declare war against Russia. But certain expressions which have recently appeared in journals of both Russia and the United States show that a different anticipation is entertained in some quarters, and it is well known that in the midst of war, points of international compact are easily strained by those who are eager to escape from all restraint. A learned correspondent of the *LEGAL NEWS*, directing our attention to the above correspondence, remarks: "For myself, I believe that (treaties to contrary, alleged, notwithstanding) Russia might in time of war not unlawfully issue letters of marque to subjects of her own, and so set afloat from the shores of any country, if they got chance, ships to cruise against Russia's enemies, and that the marines and officers on board such cruisers could not be treated as pirates. But I agree that Russia could not issue such letters to all the world;" and he refers to Wheaton and the notes by Lawrence.

SALE OF MORTGAGED SHIP.

The decision in the case of *Kelly & Hamilton*, 16 L. C. Jurist 320, seems to have created an impression that a mortgaged vessel could not be sold under execution. In a recent case of *D'Aoust v. McDonald*, and *Norris*, opponent, the Superior Court, at Montreal, maintained an opposition by a mortgagee on this ground. The opposant went to Review, and there the judgment has been reversed by a majority of the Court. The reasons of judgment, which will be found in the present issue, hold that the decision in *Kelly & Hamilton* merely went to this extent: That a Sheriff's sale does not purge a mortgage, but conveys only the defendant's rights. The Court decided, therefore, that the mortgagee had no right to stop the sale.

AUTHORITY OF SHIPPING AGENTS.

A case of considerable interest to the shipping trade, *Leaf et al. v. The Canada Shipping Company*, was decided by the Superior Court, at Montreal, Johnson, J., on the 30th ultimo. The question was as to the liability of goods to the carriers, not for the freight thereon, but for a previous debt of the intermediate shipping agents. The carriers in this instance, the Canada Shipping Company, claimed a lien on certain goods for a debt due to them by Win-

gate & Johnstone, the agents through whom the goods were shipped. The bill of lading under which this extraordinary pretension was urged, stipulated that "the owners or agent of the line have a lien on these goods, not only for freight and charges herein, but for all previously unsatisfied freights and charges due to them by the shippers or consignees." The freight claimed from Leaf & Co., and paid by them under protest, was not due for goods owned or shipped by them at all, but which had been shipped by the same agents for other parties. The Court held that in the absence of specific proof of a particular mode of dealing between Leaf & Co. and the carriers, the former could not be held liable for the debt of other people under the stipulation of the bill of lading. And reference was made to Story, who, speaking of a lien for a general balance of accounts, says, "it is so little favored, as a matter of public policy, that if disputed, it must be shown to exist in the particular case, either by a general usage, or by a special agreement, or by a particular mode of dealing between the parties."

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, April 5, 1878.

Present: TORRANCE, DORION, RAINVILLE, JJ.
D'Aoust v. McDonald, and *Norris*, opponent.
[From S. C. Montreal.]

*Sale of Mortgaged Vessel—Rights of Mortgagee
Creditor—Privilege for Wages under C. C.
2383—"Last Voyage."*

Held, 1. That although C. S. C. cap. 41 was repealed by 37-38 Vict. c. 128, s. 3, (1874), a bill of sale by way of mortgage of a vessel registered under the former statute, made after the passing of the repealing Act in the form usual under the former statute, created a valid mortgage.

2. That it was not necessary to the validity of a mortgage on such vessel that she should first be re-registered under the Imperial Merchants' Shipping Act of 1854.

3. That the form I, given in the Merchants' Shipping Act, need not be strictly adhered to, in the case of a vessel registered under c. 41, C. S. C.

4. That the privilege accorded by C. C. 2383 for the wages of master and crew of a ship for the "last voyage," does not apply to a balance of wages for a season's continuous navigation on the St. Lawrence and Lakes, though the master and crew signed articles for the season, and were paid by the month and not by the trip.

5. That a mortgagee of a vessel cannot prevent the seizure and sale thereof by a judgment creditor, but such sale will not purge his mortgage, and will only convey to the purchaser the rights of the judgment debtor in the vessel, the mortgagee retaining his rights under his mortgage against the vessel in the hands of the purchaser.

The judgment of the majority of the Court of Review, which reversed that rendered by the Superior Court, Mackay, J., was pronounced by Dorion, J., as follows :

In August, 1874, Norris and others sold to McDonald an inland registered vessel called the "*America*" for a price said to have been paid cash, and this sale was duly registered. This vessel had been registered previous to the repeal of the chap. 41 of the Consolidated Statutes of Canada.

In September, 1874, McDonald mortgaged the "*America*" to Norris for \$6,000 payable in three yearly instalments of \$2,000 each. The mortgage is in the form prescribed by the Statute above referred to.

The plaintiff, who is a judgment creditor of McDonald, has caused the "*America*" to be seized in satisfaction of his judgment, and Norris has filed an opposition *afin de distraire* claiming the vessel as his own under his mortgage.

The plaintiff has contested this opposition under three grounds :—

1st. That the mortgage is worthless, not being in the form given by the Merchants' Shipping Act of 1854, which was the only law in force in the time of the making of said mortgage, the ch. 41 of the Consolidated Statutes having been repealed. (37-38 Vict. c. 128, s. 3.)

2nd. That plaintiff's claim was a privileged one which had precedence over that of the opposant.

3rd. That the opposant could not prevent the sale of the vessel, and could only come in either by opposition *afin de charge* or *afin de conserver*.

First, upon the first two grounds I am against the plaintiff. The sec. 14 of the above Act repealing ch. 41 of Consolidated Statutes expressly declares that vessels already registered need not be registered except in one particular case. And the sec. 66 of the Act of 1854 says that the mortgages shall be made in form given, or as near to it as circumstances will permit. The vessel having been registered under ch. 41 of the Consolidated Statutes, the mortgage

could only be made according to the description contained in the original registration; and as to the rest of the document the forms in both Statutes are materially similar, so that the mortgage is perfectly good in my opinion.

As to the question of privilege, it is impossible to apply Art. 2383 C. C. to this case. This article applies only to the last voyage. That does not mean a master of a vessel hired by the season to navigate within the limits of our rivers or lakes, and who makes trips, *not voyages*, every day or two days, and sometimes many trips in one day. This has been decided in many cases.

But I do not consider that the question of privilege or no privilege can affect this case.

The question is whether the defendant has any interest in this vessel, and, if he has, can that interest be seized and sold by sheriff, notwithstanding the mortgages that may affect her? The only case in point decided in Lower Canada is that of *Kelly v. Hamilton*, 16 L. C. J., p. 320. In that case the vessel had been sold by sheriff's sale without opposition from the mortgagee. The mortgagee took a *saisie-revendication*, alleging that his mortgage was then due and payable, and claiming that the vessel be delivered to him in order that it might be sold for the payment of his mortgage, and demanding an order of the Court that such sale should take place. This *saisie-revendication* was dismissed by the Superior Court, which maintained that the sheriff's sale had purged the mortgage. The Court of Review reversed this judgment, and gave for reasons not that the sheriff's sale was invalid, but that it could not have transferred to the purchaser more rights than the mortgagor himself had in the vessel, and that the sale did not interfere with the mortgage. The Court of Appeals, three Judges against two, maintained this view of the case. But nowhere in that case is it contended that the sheriff's sale was a nullity.

Here we are, asked to say that a registered vessel can never be sold by sheriff or otherwise because there is a mortgage upon her! The first question that suggests itself to one's mind is who is the proprietor? Is it the mortgagor or mortgagee? This is answered by Art. 2371 of our Code: "And the person to whom such transfer is made (mortgagee) is not deemed to be the owner of such vessel or share, except in

so far only as may be necessary for rendering the same available by sale or otherwise for the payment of the money so secured."

This article shows that the real ownership remains in the mortgagor with all its accessories, as right of possession, &c. The ownership of the mortgagee is limited to his right of having the vessel sold for the payment of the mortgage when exigible. Then if the defendant is still owner, the opposant has no right to oppose the sale. Of course that sale will not affect his mortgage, which will follow the vessel into whatever hands it may go. The purchaser will buy her subject to the mortgage, and will take the place of the mortgagor, as was done in *Kelly & Hamilton*.

I am, therefore, of opinion that the opposition was unfounded, and that the judgment should be reversed. *Kitchen & Irving*, 1 Jurist (new series), Vol. 5, p. 1, p. 119.

TORRANCE, J., dissented.

Judgment of S. C. reversed.

R. A. Ramsay for plaintiff.

Trenholme & MacLaren for opposant.

Montreal, Dec. 1, 1877.

JOHNSON, DORION, BELANGER, JJ.

[FROM S. C. MONTREAL.]

DALTON V. DORAN, and DORAN, Opposant.

Opposition—Marginal Notes and Erasures.

An opposition *a fin de distraire* contained a number of erasures and marginal notes which were not referred to or approved. The plaintiff moved for its rejection, citing C. C. P. 295; 5 L. C. B. 36. *Held*, confirming the decision of Taschereau, J., that the opposition was null by reason of the irregularities referred to.

Judgment confirmed.

Archibald & McCormick, for opposant.

F. L. Sarrazin, for plaintiff.

SUPERIOR COURT.

Montreal, February 12, 1878.

MACKAY, J.

DALTON V. DORAN, and DORAN, Opposant.

Costs—Opposition.

Held, that where an opposition to the sale of moveables, seized under a *feri facias*, has been dismissed with costs, the opposant will not be permitted to make a new opposition with the

same object until he has paid the costs incurred by the adverse party on the first opposition.

Archibald & McCormick, for opposant.

F. L. Sarrazin, for plaintiff.

Montreal, April 8, 1878.

DORION, J.

FARMER V. O'NEIL.

Award of Arbitrator—Parties not Heard.

The defendant moved to reject the award of the Rev. Mr. Dowd, who had been appointed sole arbitrator and *amiable compositeur*, on the ground that it did not state that the parties had been heard before him, or had an opportunity allowed them to urge their respective pretensions. *Held*, that the defect was fatal, and the motion to reject the award was granted.

Doutre & Co., for the plaintiff.

Bethune & Co., for the defendant.

Montreal, April 30, 1878.

JOHNSON, J.

LEAF et al. V. THE CANADA SHIPPING COMPANY.

Bill of Lading—Lien of Carrier for previous debt of Shipping Agents.

The carriers claimed a lien on goods for a previous debt due for freight, not by the owners of the goods shipped, but by the intermediate shipping agents for goods shipped for other parties. The bill of lading stipulated that the carriers should have a lien on the goods "for all previously unsatisfied freights and charges due to them by the shippers or consignees." *Held*, that the owners of the goods could not be held liable in the absence of specific proof of a particular mode of dealing between them and the carriers to meet the case.

JOHNSON, J., who rendered the judgment, said: This is a point of some interest to the shipping business of the port. The plaintiffs are London merchants, and in July last sold to Robert Dunn & Co., of Montreal, goods to the value of about £2,900 sterling, which were shipped in part on board the steamship *Lake Megantic* in the beginning of July, and the rest later in the month on board the steamship *Lake Nipigon*—both ships owned by defendants. Before the arrival of the goods at Montreal, R. Dunn & Co. failed, and the plaintiffs, as unpaid vendors, stopped the goods *in transitu* in the hands of the carriers. In September, after the arrival of the goods here, they paid the freight and charges to the defendants, who

however, refused to deliver the property to them without a further payment of \$228.96 due for freight upon a previous shipment of goods made to the same parties, but not by the plaintiffs, who paid the sum demanded under protest, and have brought the present action to get it back. There is no question as to the right of stoppage *in transitu* under the circumstances; indeed, it is admitted, as are all the other material facts; the two most material being, first, that the goods for which previous freight was still due were not purchased from the plaintiffs, and secondly that the defendants were not aware of the fact. All the shipments were made by the agency of the same party—a firm of shipping agents at Liverpool of the name of Wingate & Johnstone. This statement of the case sufficiently discloses everything in issue, and the sole contention of the defendants is that the plaintiffs' goods, on which a lien is claimed, were subject to it in virtue of the stipulations of the bill of lading, one of which is that "the owners or agent of the line have a lien on these goods, not only for freight and charges herein, but for all previously unsatisfied freights and charges due to them by the shippers or consignees." Wingate & Johnstone are proved to be very extensive shipping agents to this country, and the bills of lading in use by the defendants are all in the same form. The object of the stipulation appears reasonable and necessary as far as the shipowners are concerned. They are, it is said, often exposed to lose their freight in these days of expeditious unloading by machinery unless they retain such a power; but the question is not as to their power to make such a stipulation with those who chose to assent to it, but whether the plaintiffs here (Leaf & Co.) are bound by a stipulation made by the intermediate agents (Messrs. Wingate & Johnstone), not coming within the immediate scope of the purpose for which they were employed. No case in point has been found, and I must decide the point upon principle. These bills of lading seem to be getting more and more stringent, and as far as people choose to submit to them the Courts have nothing to say. Story, No. 382, treating of the right of lien, says: "In regard to common carriers, they have a lien not only for the freight and charges of carrying the particular goods, but sometimes

also for the general balance of accounts due to them. This general lien seems to have originated in special agreements and notices, but it has now become common. Still, however, it is so little favored, as a matter of public policy, that if disputed, it must be shown to exist in the particular case, either by a general usage, or by a special agreement, or by a particular mode of dealing between the parties." And the general principle laid down in *Kay on Shipping*, vol. 1, p. 326, is that "the amount of freight for which the shipowners and master may enforce their lien on goods is, generally speaking, the freight which is mentioned in the bill of lading." The stipulation here is one between the carriers and the shipper or the consignee as to previous freight that may be due by the one or the other. There is no previous freight due by Leaf, Sons & Co., who are the shippers in reality; and in the absence of specific proof of a particular mode of dealing between them and the owners of the ship, the Court cannot extend the powers of the intermediary so as to bind all the merchants of England to pay the debts of other people. The action, therefore, is maintained, and the plaintiff has judgment.

Abbott, Tat, Wotherspoon & Abbott for the plaintiffs.

Lunn & Davidson for the defendants.

THE TOOLS OF THE LEGAL TRADE, AND HOW TO CHOOSE THEM.

[Concluded from page 214.]

According to fundamental doctrine as adjudged by the courts, the reader will remember, if a contract made in a particular country, by whatever parties, is there void, it will not be deemed valid in any other country. And the reason is that, for persons to form a contract, their minds must come into accord; and it cannot be said that they do, when, by the law of the place where they are, and to which in every movement they are subject, it is declared that they do not, and that the act of apparent accord is void. This is the doctrine even as to ordinary contracts; it applies to marriage, because, though in another sense marriage is a *status*, yet the assumption of the *status* can only be by contract. In marriage, however, there are still other reasons for the doctrine. If parties,

being in state A, do what in some other states would amount to a marriage, or what would be declared such in most states, yet in state A they are deemed not married, the other states of Christendom cannot treat them as married, for reasons too obvious to need mention. Nor, though their domicile happens to be in state B, can the latter hold them to be married, notwithstanding they submitted to ceremonies adequate, had they transpired in state B, to constitute a marriage there; because, among other reasons, marriage is a thing of public and international law, and one state should not accept as a marriage what is pronounced not to be such by the rest of Christendom. If, by the law of the place where parties are, there is no way reasonably possible in which they can be married, then the supreme law of necessity, to which all other laws do always yield, steps in and permits them to marry according to the forms of their domicile; or, if, having a domicile abroad, the law of the place where they are permits them to marry in a form different from that prescribed for citizens, accepting the marriage in such form as valid—why, of course, it is valid, not only at the place of its celebration, but elsewhere. In the former instance—that is, the marriage of necessity—there is, perhaps, an exception to the general rule; in the latter, the exception is apparent, not real. Such is the doctrine of the courts, sustained by abundant adjudications.

But our author sets it down as undoubted law, though he does not claim it to have been directly adjudged, that, if the assumed marriage is not contrary to the general law of Christendom, and it accords with the law of the domicile of the parties, it is, though celebrated in a state which pronounces it void, good in the state of the domicile. Nor does he stop here; but, still unconscious of uttering anything contrary to judicial decision, he maintains that even a domicile need not be a factor in the proposition. I quote a few words: "Marriages which by our law are incestuous are not invalidated by being performed in another land where they would be lawful; and so the converse is true, that the marriage, in England, of a man with his deceased wife's sister [it being, by act of Parliament, absolutely void] would be recognized as valid in such of our American states as hold such a marriage to be legal." "A poly-

gamous or incestuous marriage is internationally void, though contracted in a country where it is valid; a marriage, by consent, of two competent persons, to the exclusion of all others, is internationally valid, though void in the country where it was contracted." "Nor, although the question has never judicially arisen, is it believed that a prior marriage, by consent, of emigrants to this country, will ever be nullified by our courts if such marriage, though invalid by the *lex loci contractus*, had the constituents of a common-law marriage as hereinbefore stated. The question is, What was the law of marriage the settlers of this country brought with them?" And thus onward the jumble goes, all askew, about questions as firmly settled by decision as it is possible anything in the law can be. Among other curiosities, the cases which establish and define the real exception and the apparent one to the rule of the *lex loci contractus*, as already stated, are pressed into the service of showing that the rule itself, upon which they thus engraft the real and the apparent exception, does not exist! How can there be an exception to a rule if there is no rule? And, if the defining and limiting of an exception to a rule does not admit the existence of the rule, what does?

Still, on an examination like this, we do not proceed at once to condemn a book. We look further. But, as it is not the object of this article to conduct the reader to an opinion concerning any particular book, and as the one of which we are now speaking is, as to this article, merely imaginary, and is nameless, being introduced only as a help in explaining methods, we here leave this branch of our topic.

As partly shown already, one test, which any lawyer can apply to a book, is to take from his shelves volume after volume of the reports of his own State, turn to the cases on the subject of the book, see whether or not the author has them, and how he has treated those which he cites. Again, let it be noted whether or not the author, mistaking the points decided, has referred to cases having no relevancy to the subject of his text. This cannot be ascertained by looking from cases to the book; but, reversing the process, the person making the examination must look from the book to the cases.

Though an author is found to be incompetent

in one style of book-making, he may not be in another. There is many a man who can write an excellent digest, with no ability to produce a treatise. In like manner, one may be able to follow another author, to copy from him; to change words and the forms of citation so as seemingly to cover up a piracy, to transfer to his page the words of judges, and even to do considerable execution with the head-notes in the reports, with no capacity to lead the way through a difficult subject, or even to ascertain what is decided in a case divested of the syllabus.

Much more might be said; but these hints, as to the methods of testing a book which we are to use a tool, must suffice except as to a single enquiry. In another connection (*) I expressed some views on the question of American authors mingling English productions with their own, and publishing the whole as original. But is this a matter to be regarded in examining a book which we are to use as a tool? In theory it is plain, in advance, that an author who does not personally examine the English cases, but appropriates English works with their citations instead, can become only a sort of editor, not having acquired that knowledge of his subject which is essential to the production of a work of high value. Still, if, in fact, a work is found to be of high value it is of but little consequence to the user how it became so.

If we knew the true scientific reasons—I do not speak of laziness, or the want of time or of ability, or the thirst for pillage, but the true scientific reasons—why the making of a book by piracy is deemed, by the advocates of it, the best method, we might the better discover how it should affect the practical question now under consideration. But to whom, or to what book, shall we apply for those reasons? My own mind has been directed to this subject for nearly thirty years, while I have been reading the books of the law, and in but one place, in any book, have I seen a reason stated. It was that the English text-books contain "the settled views of the English profession;" hence, of course, they should be incorporated into the American book. It was not shown by what process it is that an English author, writing

while the courts are in session, and the mass of English lawyers are engaged in their varying avocations, and there is no congress of lawyers, is able to set down in his book, not the deductions of his own individual mind, but "the settled views of the English profession." Still, as I have before shown, the author making the assertion knows better than we; therefore it is true.

Hence, in examining a book, it is of the highest importance to ascertain whether or not, or to what extent, it is pirated—the pirated parts being of more than the average value. They are the ripe conclusions, not of a single mind, but of an entire profession. Therefore, of course, those parts will be found, in a book we are examining, carefully distinguished from what is less valuable by quotation-marks, and the notes will contain exact references to the English or other sources. But, no; observation shows that those American books which are made, in part, by pirating the English do not do this. As said by the present writer, in the article already alluded to, "It is done in different ways. Sometimes the author makes a series of rather indistinct acknowledgments in his notes, carefully excluding from his text marks of quotation or other intimation that the matter is not original; sometimes he covers the thing by an indistinct expression of thankfulness in his preface; sometimes the coveted morsel is simply taken and swallowed and nothing is said; at other times one can discover elaborate efforts at concealment, as if from consciousness of theft." Now, I submit that here is a great defect, not in one book, but in all of this class. Matter of high authority is mingled with what is common, leaving it doubtful what weight is to be given to anything. The fool becomes of uneven temper, and uncertain in the work it performs. Even, I submit, if the book pirated from is American, the like criticism also applies.

Why, then, should not marks of quotation be used, and exact references given in the notes? A printer buys his type by the pound, and a font with an extra proportion of these marks costs no more per pound than one with a less proportion. The workmen set the type by measure, and by measure the publisher pays for the work. Quotation-marks, therefore, do not increase the cost of a book. It is vain to say

(*) 63 Law Times (London), 106; reprinted 5 C. L. J. 191.

that there are old standard law-books in which they are not employed. King James' translation of the Bible is standard, and in it there are no marks of quotation. So was the English language properly written then; but, at the present day, the method is different. Now (I quote from approved authority), "a word, phrase, or passage, belonging to another, and introduced into one's own composition, is distinguished by marks of quotation."* When, therefore, a writer in these days employs language in what purports to be his own composition, with no distinguishing sign, he affirms it to be his own. The instances in which the sign may be other than the marks of quotation are carefully set down in the authority just cited; namely, when words from a dead or foreign language are put in italics, and sometimes when poetry, or even prose, is quoted in distinct and separate lines, and in smaller type. Would it not be interesting if, reading on, we should find that, where matter of higher authority is introduced by an author into his own, and a special value is attached to it, he should print it precisely as if it were his own, carefully avoiding all distinguishing signs?

But the distinction between open quotation and piracy is very hard to understand; so, let me endeavor to explain it further. An excellent writer, in a recent number of this Review, says: "Bishop seems to think a law-writer should be original." And for this he refers to passages in which Mr. Bishop speaks of the importance, among other things, of quotation-marks.† "The writer of this article, however, being ignorant of any real originality in the modern world of thought, and having no respect for that puerile originality which consists in new expressions of old truths, insists upon the authority of Coke, and begs leave to give notice that (fearless of actions of trover and conversion) he means to appropriate the truth of the law whenever and wherever so fortunate as to find it." I can speak for Mr. Bishop so far as to say that he does not deem the action "of trover and conversion" the appropriate one for a literary piracy, or regard the seeking of truth wherever one can find it a just foundation for any action. But, if an author professes to write in the English language of the present age, and he

publishes another's thoughts and words as his own, in a form which is the exact equivalent of saying in terms, "They are mine"—is this a method of seeking truth? No considerate person ever maintained that one should write a law book for the sake of displaying originality. If an author proceeds exactly on the plan stated in the passage I have just quoted, but minds his foot-references and quotation-marks, no one will be so slow to throw a stone at him as the writer of the present article. Should the whole book turn out to be quoted, all the honest. Let an author avoid "puerile originality;" that is right. If he is "ignorant of any real originality," he may not be ignorant of other important things, and his book may be a good one.

Thus I have written, avoiding all mention of particular books or individual instances, but endeavoring to impress the reader with what I deem to be truth of the very highest importance. That the subject is of the first consequence to practising lawyers, no one will deny. Even the travelling tinker aims to select and take with him suitable tools. And, keeping scientific considerations all out of view, if there is any art or trade which more than any other requires good tools, it is legal practice.

In our agricultural journals, in our journals devoted to every other calling but the legal, there are frequent and earnest discussions regarding tools. With how much more appropriateness, therefore, should there be such discussions in our legal journals!

Let us hope that this article will not be the last on the subject; and that other writers, especially those who dissent from what is here set down, will take up the subject and illumine it more effectually than I have done. It is a subject pertaining to the every-day labors of every lawyer in the land. And, to repeat, no artisan is so absolutely powerless without his tools as the practising lawyer. With no other artisan does the subject of tools go so effectually both to the pocket and the fame.—*Southern Law Review.*

* Wilson on Punctuation, 228.

† Referring to Bishop, First Book, secs. 263-267, 307.

THE SUPREME COURT.

The following is a report, from the *Hansard*, of the debate in Committee of Supply of the House of Commons, on the appointments of Registrar, précis writer, &c., of the Supreme Court:—

25. Précis Writer of the Supreme Court of Canada and the Exchequer Court. \$1,900

Mr. MITCHELL said the Government had taken credit for having passed the Supreme Court Bill, and, to his mind, it was a very expensive morsel. And next summer they would have an immense number of election cases coming up to be tried, the result of the corruption on the other side; and, when they knew that some of these law suits cost \$10,000, he trembled at the expenses to that Department.

Mr. MACKENZIE: The Court will make a great many of you tremble.

Mr. MITCHELL said it would make a great many tremble, and it would prevent many gentlemen from coming forward to contest the constituencies, because they knew the dreadful cost of such suits.

Vote agreed to.

26. Clerk of the Supreme Court of Canada and the Exchequer Court.\$475

27. Senior Messenger of the Supreme Court of Canada and the Exchequer Court\$500

Mr. MITCHELL said he thought there was some inconsistency in the senior messenger being paid a higher salary than was paid to the clerk. He did think that the clerk of the highest Court in the land ought not to receive \$25 a year less than the messenger in the same Court.

Mr. LAFLAMME said the clerk was a junior clerk, and entered this office at the salary fixed by the Statute, and had received the statutory increase. The messenger was a senior officer who had been transferred from the Department of Justice. There were three messengers in this Department during the reign of his right hon. friend (Sir John A. Macdonald). It was also necessary to have a crier or tipstaff to the Court, and the senior messenger had been appointed to this office, so that he filled both offices without receiving any additional salary beyond the statutory increase.

Mr. MITCHELL: Still the clerk of this Court, a high functionary, gets \$25 less than the tipstaff who stands at the door.

Mr. LAFLAMME: That is not the only clerk; the clerk has \$2,600 per annum.

Mr. MITCHELL: I thought he was the only clerk. I take back what I said; I had no idea there was such an extravagant salary as \$2,600 paid; I do not see it in this estimate.

SIR JOHN A. MACDONALD said he considered the expenditure of the Court was very large. The salary of \$2,600 for the Registrar was very large, considering that the Court did not sit often or long.

Mr. MITCHELL: And does not decide very quickly.

SIR JOHN A. MACDONALD: The Registrar, I fancy, is reporter as well.

Mr. LAFLAMME said the précis writer was the official reporter, but the Registrar was responsible for the publication of the reports.

SIR JOHN A. MACDONALD: Then the précis writer gets \$1,900 as reporter to the Court?

Mr. LAFLAMME said the précis writer also acted as registrar in the absence of the present registrar. The précis writer was a most important appointment, and he was sure that the salary was not more than he was entitled to.

SIR JOHN A. MACDONALD said it appeared to him that the clerk was rather a supernumerary.

Mr. BLAKE said he was responsible for proposing this officer. The two high officials, the registrar and précis writer, were appointed by the Statute, which also provided for "the appointment of such other officers as may be required." For some time they proceeded with those two officers, but it was afterwards found necessary to appoint one clerk, and this clerk was appointed in the lowest grade in the public service. The hon. gentleman (Sir John A. Macdonald) had the opportunity of objecting at the time the appointment was made, when the nature of it was fully explained to Parliament. He admitted there was one objection taken when this vote was proposed, by his friend the hon. member for Frontenac, who exclaimed loudly against the smallness of the sum paid, because he said it was impossible to secure an efficient man at a small price.

SIR JOHN A. MACDONALD: Provided he was wanted.

Mr. BLAKE said this officer had not been

appointed until it was found absolutely necessary to have him. There were filings going on constantly in that Court, which the registrar could not be expected to attend to, consistent with his other duties. Causes involving no less than four million dollars had been instituted in this Court, which had been given the petitionary right of jurisdiction, during the past twelve months. There was no Court with which he was acquainted, whose staff, considering the number of duties it was called on to perform, was so small in numbers and low in rates. The Court, in its functions and by its constitution, had to deal with causes coming from the Province of Quebec, as well as the other Provinces, and it was necessary to provide an officer who should be a French advocate as well as one who should be an English barrister. In the registrar they had been fortunate enough to secure a gentleman who was a French advocate as well as an English barrister, Mr. Cassels. The time to object to these officers and the salary was when the Act was passed and the salary proposed.

SIR JOHN A. MACDONALD: Is there not a charge for reports? Are these charges refunded?

MR. BLAKE said there was nothing to refund out of the cost of production. Nothing went to the officers.

MR. KIRKPATRICK said there was great delay in getting out the reports; a year elapsed after the decision was given before it was published, and the profession had to wait for these reports to find out the decision of the Supreme Court. There was also another important grievance: there was no translation given in these reports. Some of the decisions in the Province of Ontario were published in French, and some in the Province of Quebec, in English.

MR. BLAKE said he quite concurred in the opinion of the hon. member that there was delay in bringing out the reports, but it was a new enterprise; the Queen's printer was not accustomed to law reports, and there were many obstacles in the commencement which would not continue subsequently. The last number was now in press, which would complete the first volume of five hundred pages.

MR. LAFLAMME said it was impossible the reports could be translated. The language of the Court was English, the judgments English, and

the reports were English, particularly the cases in Ontario, which were altogether English. In Lower Canada there was no difficulty on this score, as every barrister there knew both languages. It was only the judgments of some of the judges who gave their judgments in French, which were published in that language.

MR. MITCHELL said the statement of the hon. member for South Bruce, that objection should have been taken when the officers were appointed, was not a correct one. The Government had come down, backed by a majority of seventy to eighty, with a scheme for the Supreme Court and with a staff of officers to carry out the details, and the Opposition had to look on and submit. It was not necessary, because they had voted last year in ignorance of the necessities of this Court and upon the responsibilities of hon. gentlemen opposite, that the same vote should be repeated this year, when it was found the staff was larger than was required. The Supreme Court was a very expensive luxury, but if it did its work effectually it would be borne with. He would cite the case of his hon. friend from Charlevoix which was expedited very quickly and at an enormous expense; while in the case of the hon. the Minister of Justice, which had been before that Court nearly a year, no decision had been given. If his election should be annulled, the decision would have no effect, as there would be a dissolution of Parliament at the end of this Session, and the hon. gentleman would have, in the meantime, unjustly retained his seat.

MR. BLAKE said the case was only argued in the end of January last, so that it could hardly be fairly said to have been twelve months before the Court.

MR. MITCHELL said when the argument took place was not the first time the case came before the Court. It had been generally given out that the judgment would have been pronounced in the month of January, and it had not yet been pronounced.

MR. BLAKE said that surely the hon. gentleman, as an independent member, did not desire the Government to approach the Supreme Court and invite them to expedite their decisions or the reverse. The common sense of the House would condemn the proposal of the hon. member.

MR. MITCHELL said that was not the point he

had made. He held that it was the duty of the Government, under the exceptional circumstances, to have called the attention of Parliament, the masters of the Supreme Court, to the fact of the delay.

MR. PLUMB said that the election law was claimed by the Government as one of its great reforms, entirely forgetting the fact that there was an Election Bill passed in 1873. By a clause inserted in the law, a member having taken his seat during the sitting of Parliament, could not be unseated until the close of the Session, whatever were the circumstances under which he had obtained it.

Vote agreed to.

28. Second Messenger of the Supreme Court of Canada and the Exchequer Court \$380
29. Contingencies and Disbursements, including printing, binding and distributing Reports, Judges' travelling expenses; also salaries of officers (Sheriff, Usher, &c.,) in the Supreme and Exchequer Courts of Canada, and \$150 for books for Judges \$7,000

In reply to Mr. Mitchell,

MR. LAFLAMME said the total expense of the Supreme Court last year was under \$52,000.

Vote agreed to.

NEW PUBLICATIONS.

MORGAN'S LEGAL MAXIMS: Robert Clark & Co., Publishers, Cincinnati, O.

In this work Mr. Morgan, author of "The Law of Literature," has brought together in a volume of convenient size 2,882 maxims, culled from a great variety of legal works. The maxims are given in English, with the original text below, and the whole compilation is indexed so as to facilitate reference. The work is very neatly printed and bound, and will no doubt prove acceptable to the practitioner as well as to the student.

THE SCHOLASTIC NEWS: Montreal, printed by T. & R. White.

This is a monthly journal, devoted, as the title indicates, chiefly to educational subjects. The contents are useful and interesting, and a journal of this character should find a wide constituency. The type and paper are alike excellent, and place the new journal in these respects on a par with more pretentious productions.

DIGEST OF ENGLISH DECISIONS.

The following is a digest of the decisions which are of interest to the majority of our readers, reported in the English Law Reports for November and December, 1877, and January, 1878:—

Adjacent Support.—Between the coal mines of the plaintiff and those of the defendant there was an intermediate piece of surface land, from under which the coal had long before been extracted by a third party. In the ordinary working of his mine, defendant had dug near the intermediate piece of land, and the latter had given way, thus causing a portion of the surface over plaintiff's mine to subside. *Held*, that the plaintiff was entitled to no relief.—*Corporation of Birmingham v. Allen*, 6 Ch. D. 284.

See Injunction.

Administrator.—*See Executor and Administrator.*
Agreement.—*See Lease.*

Ancient Lights.—Where an old building having ancient lights was demolished and a new one put in its place, and a skylight put into the new one, substantially where a dormer window in the old one was situated, *held*, under the circumstances, that by 2 & 3 Will. IV. c. 71, § 3, the right to the light was not lost. But where the new building on the servient estate which obstructed the skylight was nearly completed, damages were allowed and an injunction refused.—*National Provincial Plate Glass Ins. Co. v. Prudential Ins. Co.*, 6 Ch. D. 787.

Attorney and Client.—1. The rule that a solicitor cannot take a gift from a client while the professional relation exists, applied with rigor.—*Morgan v. Minett*, 6 Ch. D. 638.

2. A solicitor who acts for both mortgagor and mortgagee cannot claim a lien upon the title deeds for costs due him from the mortgagor, so as to entitle him to withhold the deeds from the mortgagee until those costs are paid, although the mortgagee knew that he had such lien as against the mortgagor.—*In re Snell (a solicitor)*, 6 Ch. D. 105.

3. A client paid her solicitor his bill, and gave her business to other solicitors, who also received the deeds and other documents relating thereto. *Held*, that the first solicitor could retain the client's letters to him relating to the business, and also the press copies of his to her.—*In re Wheatcroft*, 6 Ch. D. 97.

See Company, 6.

Bankruptcy.—1. A gas-light company does not come within the words "landlord or other person to whom any rent is due from the bankrupt," in § 34 of the Bankruptcy Act, 1869, although the sum due the company for gas is, in one section of the Gas Works Clauses Act, spoken of as rent, and the special act under which the gas company was organised gives it power to levy by distress for such sums.—*Ex parte Hill. In re Roberts*, 6 Ch. D. 63.

2. Certain traders being in contemplation of bankruptcy, and wishing to raise money, arranged with one S. to draw bills on them, which they accepted. S. then sold the bills, amounting to £1,717, to Jones, the appellant, for £200. Jones was a discounteer of bills, but never had bought any before this transaction. He had refused to discount these bills. He supposed the acceptors could not pay in full, and might, by inquiry, have found out their true condition. He knew that they had assets; and on their going, three days afterwards, into bankruptcy, he claimed to prove for the full face of the bills. The County Court in bankruptcy restricted the proof to the £200 paid for the bills; the Chief Judge reversed this, and allowed proof on the face of them; the Court of Appeal reversed the Chief Judge's order; and, on appeal to the House of Lords, *held*, that proof for £200 only could be allowed, as Jones must be held to have had knowledge of the fraud on the part of the maker and acceptors of the bills.—*Jones v. Gordon*, 2 App. Cas. 616; s. c. 1 Ch. D. 137.

3. In a marriage settlement, M., the intending husband, assigned a policy on his life, for the benefit of his wife, to the trustees, and covenanted to pay the premiums. At the same time, a fund was set apart, out of which the premiums were to be paid, in case M. failed to pay them. May 8, 1871, M. went into bankruptcy, and from that time the premiums were paid out of the fund. May 15, 1874, the trustees of the settlement had the value of M.'s covenant to pay the premiums estimated, and proved the amount, £2,052 8s., as a claim against his estate. April 13, 1876, a dividend of 10s. was declared on M.'s estate; but before the receipt for this percentage on the above £2,052 8s. was signed by the trustees of the settlement, M. died. The amount paid for premiums out of the wife's fund had been £768 5s. *Held*, that

the trustees of the settlement should receive only £768 5s. actually paid out in lieu of the dividend on £2,052 8s. already declared.—*In re Miller. Ex parte Wardley*, 6 Ch. D. 790.

Bequest.—A testatrix gave to a charity all her household furniture, pictures, goods, chattels, trinkets, jewelry, and effects which might be in her dwelling-house, and also all her ready money, money at the bankers, and money in the public funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution. Her personal property amounted to about £100,000, and her real to about £50,000. The will contained nothing but this bequest, and the appointment of executors. *Held*, that the bequest to the charity was specific, and that the debts, expenses, and costs must be paid first out of the personal estate undisposed of, then out of the real estate; but that the heirs having no interest in the probate of the will, the real estate was not in any event liable for the probate duty which must come out of the charitable bequest. The unpaid premium on a long lease, which the testatrix had sold some time before her death, was declared realty.—*Shepherd v. Beatham*, 6 Ch. D. 597.

Bill of Lading.—See *Mortgage*.

Bills and Notes.—See *Bankruptcy*, 2; *Husband and Wife*, 1.

Burden of Proof.—See *Presumption*.

Charity.—See *Bequest*.

Charter-Party.—By charter-party, the vessel V. was let by the defendant to the plaintiffs for six months, to "be placed under the direction of the charterers," "for the sole use of the charterers," "commencing from the vessel's being ready . . . to be at the disposal of the charterers," "The charterers to have the whole reach of the vessel's holds . . . including passengers' accommodation, if any, sufficient room being reserved to the owners for the crew," &c.; the crew to "render all customary assistance in loading and discharging." "The captain to sign all bills of lading . . . to follow the instructions of the charterers . . . as regards loading," &c. The owners hired the master and men, and paid their wages. "The captain to furnish the charterers . . . when required, a true daily copy of the log," &c. While at sea, under this charter-party, the V. went to pieces, and the cargo was lost, through the negligence of the master and crew; and the question was, whether the master and crew were the servants of the owners or of the charterers. *Held*, that they were the servants of the owners, and the latter must pay for damage resulting from their negligence.—*The Omoo & Cleland Coal & Iron Co. v. Huntley*, 2 C. P. D. 464.

[To be continued.]

The Legal News.

VOL. I. MAY 18, 1878. No. 20.

VALIDITY OF BAILEE RECEIPTS RECEIVED BY BANKS.

The case of *The Merchants' Bank v. McGrail*, decided by the Court of Review, at Montreal, on the 30th ultimo, deserves special notice, the question involved being one of great importance to banks and to the produce trade of the country. It arose upon the effect of an instrument known as a bailee receipt, given to the Bank by one Henry Parker, a factor and commission merchant, for goods pledged to the Bank at its agency in St. Thomas, Ontario, by Scott, Yorke & Co., of Aylmer, as security for a draft drawn by that firm upon Parker, and accepted by him. On the arrival of the goods at Montreal, the Bank, being desirous of realising thereon, entrusted them to Parker for sale, subject to its order; and received from him a receipt in the following form:

"Received from the Merchants' Bank of Canada, B. L. for 1234 hams, 100 shoulders, and 10 pos. bacon; and I hereby undertake to sell the property therein specified for account of the said bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance No. 2414, due July 11, hereby acknowledging myself to be bailee of the said property for the said bank.

"Dated at Montreal, the 22nd May, A. D. 1877.

"Signed, HENRY PARKER."

Parker having become insolvent, his assignee (intervening party in the case) claimed that by entrusting the goods to Parker for sale, under the foregoing receipt, the Bank lost all lien on them, and all right to recover possession of them.

The use of these bailee receipts has for a long time past become practically universal in the trade at Montreal, and seems to be both convenient and just; but considerable doubt has been felt as to their validity, as, in the cases in which they are generally made use of, the persons entrusted with the possession of the goods for sale under such receipts are usually the purchasers of them.

There was no difficulty about the facts of the

case in question, which may be stated shortly as follows:

On the 9th May, 1877, the Merchants' Bank, at its St. Thomas agency, discounted a draft for Scott, Yorke & Co., of Aylmer, drawn by that firm upon Henry Parker, at Montreal, and at the time of such discount received, as collateral security for its due acceptance and payment, a bill of lading of the goods mentioned in the bailee receipt already referred to, as being shipped by that firm to the Bank or its order at Montreal. By the delivery of this bill of lading, the Bank, under sections 46, 47, & 49, of the Banking Act, 34 Vict., chap. 5 (1871), became vested with the goods, and had a right to retain them till the draft so discounted, which is referred to in the bailee receipt as No. 2414, should be accepted and paid.

As already stated, upon the arrival of the goods at Montreal, Parker accepted the draft so drawn on him, and the Bank entrusted them to him for sale under the terms of the bailee receipt.

Parker accordingly proceeded with the sale of the goods; but afterwards the Bank, having learned that he was in financial difficulties, requested him to deliver to them the balance of the goods in his hands, and, upon his refusal, they attached them by process of reversion.

Parker becoming insolvent, his assignee intervened, and claimed the goods attached as belonging to Parker's estate, relying mainly upon the proposition that Parker, having purchased the goods, they were his property, and that the Bank, being only pledgee, had lost their privilege by surrendering the goods to him, under article 1970 of the Civil Code, which enacts that the privilege subsists only while the thing pawned remains in the name of the creditor, or of the person appointed by the parties to hold it.

On its part, the Bank submitted and argued the following propositions:

1. The firm of Scott, Yorke & Co., and not Mr. Parker, were the pledgors of the goods to the Bank, and the latter could validly entrust the goods for sale to Parker as their factor or agent. His possession was the possession of the Bank, in accordance with the well-known

principle of law that the possession of the agent is the possession of the principal.

2. The mere fact of the Bank having been informed that Parker had an ultimate interest in the goods cannot affect the validity of the bank's lien, or *droit de rétention*. The assignee's endeavour to wrest in his favour the principle of law, that the pledgor cannot at once pledge his goods and retain possession of them, cannot be successful. Parker was not the pledgor, nor was he the proprietor of the goods; because he could not become proprietor without paying off the Bank's lien.

3. The goods did not pass, under the attachment in insolvency, to the assignee; Parker having been merely the holder of them for the Bank in a representative capacity.

4. Should any doubt exist as respects the right of the Bank to revendicate the goods *quoad* third persons, creditors of Parker, there can be no doubt they would have had that right as against Parker, and consequently they have it as against the assignee, who stands in the place of Parker, and can have no greater right in the goods than he had (*vide* section 16 of the Insolvent Act of 1875).

The judgment of the Superior Court in the first instance was rendered by Mr. Justice Mackay, who held that although Parker had bought the hams and pork referred to, he having accepted the drafts drawn upon him and consented that the Bank should have the property to secure his (Parker's) acceptance, and he (Parker) having bound himself as expressed in the bailee receipt, the Bank had a right to the possession of the property at the time of the attachment made in the cause, and that as the Bank stood possessed before Parker's bankruptcy so it stood possessed afterwards.

The judgment of the Court of Review (Justices Torrance, Dorion and Rainville,) confirming this judgment, was delivered by Mr. Justice Torrance, who remarked: "We have no difficulty in disposing of this case. The Bank got control of the goods when they discounted the draft. The advance was to the drawers, Scott, Yorke & Co., of Aylmer, and their position could not be changed without their consent. The agreement with Parker under the bailee receipt did not change that position. On the contrary, it carefully preserved their right. The agreement was law to the parties, and perfectly

binding upon Parker. The Superior Court, by its judgment of 18th February, 1878, so held by maintaining the attachment of the Bank, and we confirm the judgment."

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, April 30, 1878.

TORRANCE, DORION, RAINVILLE, JJ.

LEFÈVRE V. BRANCHAUD.

[From C. C. Beauharnois.

Sale—Registration—Hypothec.

Held, that until the purchaser of real estate has registered his title, the creditors of the vendor may, subsequently to the sale, obtain a valid legal or judicial hypothec on such property, sale without registration having no effect as regards third parties.

The plaintiff bought an immoveable on the 28th November, 1876, and registered his title on the 5th December following. In the interval, on the 30th November, the defendant, having obtained a judgment against the vendor, registered it against the immoveable in question as being still in the vendor's possession, the purchaser not having registered his title. The plaintiff in the present case sought to have the hypothec cancelled, as having been obtained against a property which at the time the judgment was rendered did not belong to the debtor.

In the Court below, the demand was maintained, and the hypothec declared null. In Review,

DORION, J., who rendered the judgment, remarked that the case presented a pure question of law, there being no difficulty as to the facts. Does an unregistered sale divest the vendor of possession with respect to third parties, so that the latter cannot acquire a legal or judicial hypothec on the property sold? His Honor held that it did not. On the other side, art. 2026 C. C. was relied on. This article declares that judicial hypothec affects only immoveables which belong to the debtor, and the sale being perfect by the consent of the parties under art. 1472, it followed that when the judgment was obtained and registered the debtor was no longer proprietor, and his creditors could not acquire a hypothec on the property sold. This pretension, in his Honor's

opinion, was erroneous. Art. 1472 is governed by 1027, which says that in contracts for the alienation of immovables the sale is perfect by the mere consent of the parties, even as to third parties, but subject to the dispositions relative to the registration of real rights on such immovables. Recourse must therefore be had to the law respecting registration. His Honor cited articles 2082, 2083, and 2098, and held that if an unregistered purchaser cannot confer any right (2098) it is because he is not proprietor as to third persons. The vendor, therefore, remained proprietor, and the creditor who obtains a judicial hypothec must have a privilege. This doctrine was followed in France, 24 Demolombe, no. 450, and in *Chesner v. Jamieson*, 19 L. C. Jurist, 190, the Court of Appeal unanimously maintained a registered conventional hypothec against an unregistered sale, made six years before. There was no reason why a distinction should be drawn between a conventional and a legal or judicial hypothec. The judgment setting aside the hypothec must therefore be reversed.

Judgment reversed.

Duranceau for the plaintiff.

Branchaud for the defendant.

GRENIER V. LEROUX.

[From S. C. Montreal.

Donation—Revocation—Sheriff's Sale—Bidding.

Held, 1. That a stipulation for the benefit of a third party made in a deed of donation may be revoked by the donor, even without the consent of the donee, if he has no interest in its fulfilment; so long as the person intended to be benefited has not expressed his intention of accepting it.

2. An agreement between two persons that one of them shall bid up a property at Sheriff's sale to a certain figure, and then re-sell it to the other, is perfectly legitimate.

Oliver Grenier, the father, made a donation *entre vifs* of an immovable to his minor son on condition of paying 1500 livres to each of his brothers and sisters on their coming of age. This donation was accepted by the grandfather of the donee. Some months afterwards the donor revoked this donation with the concurrence of the grandfather who had accepted on behalf of the minor. But when the latter attained his majority, he formally signified his acceptance of the donation. At this date, the immovable was under seizure at the suit of

creditors of the donor. The donee then filed an opposition to annul the seizure, claiming the property as his. This opposition suspended the sale, but an arrangement was come to between the donee and the creditors, by which the former in effect renounced his acceptance of the donation.

The present action was brought by one of the brothers of the donee, against the purchaser at sheriff's sale, claiming a hypothec on the property for his 1500 livres.

DORION, J., for the Court, held that the rights of the brothers and sisters, who had never accepted the donation in any way, were completely extinguished by the donee's renunciation of his acceptance. Even if the plaintiff had a hypothecary claim, it was purged by the sheriff's sale, and the plaintiff could only be collocated on the proceeds. It was pretended that the sale was a nullity because the purchaser agreed to bid the property up to a certain amount, in order to sell it back to the donee. But the plaintiff had no right to complain of this. The judgment maintaining his claim must be reversed, and the action dismissed.

Judgment reversed.

Doutre, Doutre & Robidoux for plaintiff.

Geoffrion, Rinfret & Dorion for defendant.

TORRANCE, DORION, PAPINEAU, J. J.

THE MERCHANTS' BANK OF CANADA V. MCGRILL,
and LAJOIE, Assignee, intervening.

[From S. C. Montreal.

Bailes—Receipt—Revendication.

TORRANCE, J. The question submitted is as to the privilege of the Bank on goods revendicated. On the 9th of May, 1877, the plaintiffs at the agency of their Bank at St. Thomas, Ontario, discounted a draft for the firm of Scott, York & Co., of Aylmer, drawn by that firm upon Henry Parker, represented in the present case by his assignee, Louis Joseph Lajoie, and at the time of such discount received as collateral security for its acceptance and payment, a bill of lading of the goods as being shipped by that firm to the plaintiffs or order at Montreal. The plaintiffs say that by the delivery of this bill of lading, the bank, under sections 46, 47, and 49, of the Banking Act, 34 Vict. Chapter 5 (1871), became vested with the goods mentioned in the bill of lading, and had a right to retain them

until the draft so discounted should have been accepted and paid. On the arrival of the goods in Montreal, the Bank being desirous of realizing them, entrusted them to Parker for sale subject to its order; and received from him a receipt in the following form: "Received from the Merchants Bank of Canada B. L. for 1284 hams, 100 shoulders and 10 pcs bacon, and I hereby undertake to sell the property therein specified for account of the bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance 2414, due July 11th, hereby acknowledging myself to be bailee of the said property for the said Bank. Dated at Montreal, the 22nd May, 1877. (Signed) Henry Parker." The draft after being discounted by the Bank was presented to Parker for acceptance and by him accepted. Parker subsequently became insolvent, and his assignee, the intervening party, claims that the Bank by entrusting the goods to Parker, the real owner, for sale under the foregoing receipt, lost all lien upon them and all right to recover possession. We have no difficulty in disposing of this case. The Bank got control of the goods when they discounted the draft. Their advance was to the drawers, Scott, York & Co., of Aylmer, and their position could not be changed without their consent. The agreement with Parker under the bailee receipt did not change that position. On the contrary, it carefully preserved their rights. The agreement was a law to the parties, and perfectly binding upon Parker. The Superior Court by its judgment of 18th February, 1878, so held by maintaining the attachment of the Bank, and we confirm the judgment.

Archambault for intervenor.

Tait for plaintiffs.

Montreal, March 30, 1878.

MACKAY, DORION, RAINVILLE, JJ.

[From S. C. Montreal.

PREVOST v. WILSON, and RODGERS et al., opposants.

Wages—Tools—Privilege.

Held, that laborers working in a quarry have no privilege on the tools used in quarrying, nor on the stone extracted therefrom, especially when the tools and the quarry are not the property of the person who engaged the laborers.

The plaintiff, one of a number of laborers

who worked in a quarry at St. Genevieve, obtained judgment against Wilson for wages due for his labor. The action was accompanied by a *saisie-arret* before judgment, under which the plaintiff caused all the stone on the place to be seized, together with the machinery and tools used for quarrying. The opposants came in, claiming to be proprietors of the effects seized, and the principal question raised in the Court below was whether the laborers had a lien on the effects for their wages. The Superior Court held that they had such lien.

In Review,

DORION, J., remarked that there could be no doubt the quarry belonged to the opposants, who bought it in 1876. The defendant (who had left the country) was only a sub-contractor, who did not own the quarry or the machinery. In support of the privilege claimed on behalf of the workmen, reference was made to C. C. 434, 1993, 2001 and 2006. The first three did not apply here, and art. 2006 gives servants a privilege for wages on things belonging to the debtor. This article did not meet the case.

Judgment reversed.

Girouard for plaintiff.

Abbott & Co. for opposants.

SUPERIOR COURT.

Montreal, April 30, 1878.

JOHNSON, J.

AYLMER v. MAHER et al.

Sale—Fraudulent Collusion—Power of Attorney—Revocation.

JOHNSON, J. The plaintiff is General Aylmer living at Bath, in England, and brings the present action alleging himself to be the owner and proprietor of some lands in the Townships of Melbourne, Brompton and Cleveland, described as consisting of different lots and parts of lots, some with improvements and some without; and his object is to get a deed of sale of the 21st of January, 1875, cancelled and set aside as fraudulent and made without authority. Henry Aylmer, Junior, one of the defendants, had a general power of attorney from the plaintiff, who, I believe, is his grand uncle. This power appears to have been revoked by the subsequent appointment of other attorneys in November, 1874; but it is not quite clear that the revocation was known to the defend-

ant, Aylmer. However this may be, he assumed to act under this old power, and to sell to Maher, the other defendant, by the deed now in question. The plaintiff contends that even under the first power of attorney, supposing it to have been subsisting at the date of the deed (21st January, 1876), there never was any authority conferred on the agent to sell his uncle's real estate; and further, that the terms and conditions of the bargain sufficiently reveal that both the parties to it—the present defendants—perfectly well knew that they were endeavoring for their own ends to despoil the plaintiff of his property. On behalf of Maher it is pleaded that he purchased in good faith, paying the full contract price as mentioned in the deed, and thinking that the agent had the power to sell. Aylmer, junior, the other defendant, pleads that he had authority at the time and used it in good faith, applying the price to pay the plaintiff's debts. The questions seem to be: What was the extent of the power under the first instrument, and if it was in itself sufficient, what is the evidence of the knowledge of the parties as to its revocation, and as to their right, the one of them to sell, and the other to acquire all this property, incontestibly belonging to another person, in the manner in which they did so. Looking at the first power of attorney, it is in general terms, no doubt, and a power to sell—that is, a power of some kind is given. As to the precise extent of that power, and as to whether it was ever contemplated that the greater part of the principal's estate might be disposed of at one time by the agent, even for a valid consideration, paid to the vendor, is quite another question, and one which I should say ought, on the general principles applicable to such instruments, to be decided in the negative. Then, as to the revocation, and the knowledge of revocation, either by the agent, or by the other defendant, the rule of law cannot be more concisely stated than it is by Story, No. 470: "If known to the agent, as against his principal, his rights are gone; but as to third persons ignorant of the revocation, his acts bind both himself and his principal." This rule is reproduced in our own code, No. 1758, and supposing ignorance of the revocation on the part of the purchaser, might apply if the act was within the scope of the authority originally given, and

if the purchaser was in good faith; but in the present case, the circumstances are such as to dispel at once any idea of good faith either by the agent or the buyer. Whether the agent was formally made aware of the revocation or not, I have previously said is not made absolutely clear. From Mr. Browning's evidence it would appear at least probable that he was aware of it; but the other party to this transaction, Maher, may, I think, fairly be said not to have known that there had been any formal revocation, and to have contracted with Aylmer, the agent, as if the first power of attorney, whatever authority it might have given, had been still in force. Both parties, however, must be held to have known what was the extent of the power of the agent, supposing it even to have been unrevoked; and certainly the facts, as they come out in evidence, seem to show plainly enough that both of them knew they were doing wrong. Aylmer must have known that he was not really selling, and Maher that he was not really buying; that the whole thing was at bottom a sham; and as far as the interests of the principal were concerned, an injury and a fraud; that the price which was acknowledged to have been paid in hand, by the terms of the deed, was in reality no price to the principal at all, but merely a settlement of the agent's debt to the pretended purchaser; and that even if the agent had had power to sell at all, there could be no pretence of selling for such an object without raising at once the suspicions of any honest man. All this is painfully clear from the evidence of the parties themselves, and it is not my intention to dilate further on so plain a case. The reasons or motives of the judgment will appear fully by the record; and the result is that the deed in question must be set aside. Apart from the question of power or no power at the time, there certainly never was any at any time to sell without a price; and it is obviously no sale at all, so far as the principal is concerned, if the agent merely executes a form of conveyance to get a discharge from his own liabilities, and with the entire knowledge of the purchaser. Costs jointly and severally against the defendants.

Ritchie & Borlase for plaintiff.

Dorion & Co., and Trenholme & Maclaren for defendants.

AGENCY.—A SUMMARY OF RECENT DECISIONS RELATING TO RIGHTS AND LIABILITIES ARISING OUT OF THE CONTRACT.

[By Wm. Evans, in London *Law Times*.]

The following recent cases illustrate the rights and liabilities arising out of the contract of agency :

In all the cases in which an agent has been held personally liable for misrepresentation, it will be found that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and there appears to be no doubt, in the words of Lord Justice Mellish (*Beattie v. Lord Ebury*, 27 L. T. Rep. N. S., 398; L. Rep. 7 Ch., 777; 41 L. J., 804, Ch.), that "it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not; under these circumstances I have no doubt that it would be held that the agent is not liable." Hence, when three directors of a railway company, by a letter to the company's bankers, requested them to honor the cheques of the company, signed by two of the directors and countersigned by the secretary of the company, and cheques were accordingly drawn signed in the above manner, and were paid by the bank, the court held that the letter did not amount to a representation that the directors had more than the ordinary authority of railway directors: *Ib.*

The next case illustrates the liability of agents upon their contracts. In *Weidner v. Hoggett* (1 C. P. Div. 533), which was decided in 1876, the plaintiff had refused to sign a charter-party without an undertaking from the charterers that there should be no undue detention of his ship. The defendant, who was a clerk employed to arrange the terms for loading, accordingly gave the following undertaking: "I undertake to load the ship in ten colliery working days, on account of Bebside Colliery. W. S. Hoggett." Upon a claim being made by the captain for demurrage, the defendant denied liability, but offered a sum in

satisfaction. The jury found that the contract was between the captain and the defendant, that there was sufficient consideration for it, and that the contract was with the defendant personally. The court held that the admission and contract fully sustained the findings of the jury.

A surveyor of highways, appointed by the vestry of a parish, may be liable for accidents due to the condition of such highways: *Pendlebury v. Greenhalgh*, 1 Q. B. Div., 36. Apparently, the 56th section of 5 & 6 Vict., c. 50, which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions, does not apply to cases where the road itself is dangerous and not the materials.—*Ib.*

A cab proprietor is liable for the acts of the driver, while the latter is acting within the scope of the purpose for which the cab is intrusted to him.—*Venables v. Smith*, 2 Q. B. Div., 270.

Premiums paid in respect of an illegal insurance cannot be recovered back, for the whole transaction is void, and the law will not aid any of the parties.—*Allkins v. Jupe*, 2 C. F. Div., 375.

In an action for negligence, negligence must be proved. In *Pearson v. Cox*, 2 C. P. Div., 369, decided in 1877, the defendants were builders and contractors, who, after the outside of a house was finished, had removed the outer boarding, and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the boarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. The court held that the defendants were entitled to judgment, as there was no negligence.

The principle of *Great Western Insurance Company v. Cunliffe*, L. Rep., 9 Ch., 525, was applied in 1877 to the case of *Baring v. Stanton*, 3 Ch. Div., 502; 35 L. T. Rep., N. S., 652; 35 W. R., 237, and the custom was held binding upon a foreigner. The Court of Appeal again

affirmed the rule, that if a person employs another to do certain work for him as his agent with other persons, and does not choose to inquire what the amount is, he must know the ordinary amount which agents are in the habit of charging. There a shipowner, who for ten years had employed a firm to effect insurances on his ships, and from time to time had settled accounts without inquiring as to the custom, was held not to be entitled to call upon the firm for an account of deductions made to the firm, viz.: 5 per cent. brokerage, and 10 per cent. discount for cash, payments which had been allowed by the underwriters on each transaction.

A solicitor had been originally employed by H. to take proceedings in respect of certain shares in a company of which he was a director. In consequence of those proceedings the solicitor obtained certain checks from the liquidator of the company in exchange for shares. H. had deposited the certificates with the solicitor as a security for costs, none of which had been paid, and subsequently transferred his shares, with notice of the solicitor's lien, to the plaintiffs. The retainer was continued, by the plaintiffs, who now claimed the checks free from any lien for charges due from H. The court held that the solicitor was entitled to a lien upon them for his costs of all proceedings against the company in respect of the shares: *The General Share Trust Company v. Chapman*, 1 C. P. Div., 771.

Articles of association state the arrangement between the members; they are an agreement *inter socios*, and do not constitute a contract between the company and third parties. Hence, when articles contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, and should not be removed from his office except for misconduct, it was held that the plaintiff could not bring an action against the company for breach of contract in not employing him as solicitor: *Eley v. The Positive &c. Assurance Company*, 1 Ex. Div., 20, 88. In the Court of Appeal, Lord Cairns reserved his judgment as to whether such a clause is obnoxious to the principles by which the court are governed in deciding on questions of public policy, but observed that it was a grave question whether

such a contract is one that the courts would enforce. It is probable, too, that the contract alleged by the plaintiff did not satisfy the Statute of Frauds. A question of some novelty was raised in *Hingston v. Wendt*, 1 Q. B. Div., 367, which was decided in 1876, viz.: whether a ship captain and his agent, who made an extraordinary expenditure for the purpose of saving a cargo, and which did save the cargo, had a right to detain the whole of the cargo, if it belonged to one owner, till the whole was paid or secured; or, if the cargo belonged to several owners, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured. The court answered this question in the affirmative, although the charges were incurred without express authority from the owner.

An indorsement of a check, *per procuracion*, or as agent, is an endorsement purporting to be by the payee within 16 & 17 Vict., c. 59, s. 19, so as to protect the banker paying it, though the person making the endorsement has no authority to endorse: *Charles v. Blackwell*, 2 C. P. Div., 151; 46 L. J., 368, C. P.

The agent of a foreign government is not liable as such to any action, nor will a plaintiff be allowed to sue a foreign government indirectly by making its agents in this country defendants, and alleging that they have money of the government which they ought to apply in satisfaction of the plaintiffs' claim: *Twy-cross v. Dreyfus*, 5 Ch. Div., 605; 46 L. J., 510, Ch.; 36 L. T. Rep., N. S., 752.

Where a solicitor employed by the trustee for sale of an estate, his duty being to receive the purchase moneys and pay them into the trustee's banking account, received large sums and died insolvent, having paid such sums into his private account, and his banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate, the Court of Appeal held that those specific sums would be followed by the trustee, and there could not be a set-off alleged in respect of sums alleged to have been paid such solicitor on account of the trust estate.

The promoters of a company, who make representations in a prospectus, and invite the confidence of the persons to whom it is addressed, contract fiduciary relations with such per-

sons, and if they have bargained to retain part of the money subscribed, they must disclose that fact: *Bagnell v. Carleton*, 36 L. T. Rep., N.S., 653; 6 Ch. Div., 371.

An auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance; but, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required. Where the deposit is of large amount, he may be made a defendant, unless he has paid it into court before action brought: *Earl of Egmont v. Smith*, 6 Ch. Div., 469. A solicitor is entitled to retain, as his own property, letters addressed to him by his client, and copies contained in his letter book of his own letters to the client: *Re Wheatcroft*, 6 Ch. Div., 97. A purchase may be protected under 6 Geo. 4, c. 94, s. 4, although money does not actually pass. The action applies equally where the goods are transferred in consideration of an antecedent debt: *Thacker v. Fergusson*; 25 W. R., 307.

Where a drainage board had delegated its powers to a committee under the Land Drainage Act, 1861, schedule 2, r. 6, that committee cannot delegate its powers to one of the members.

DIGEST OF ENGLISH DECISIONS.

(Continued from p. 228.)

Common Carrier.—See *Railway; Stoppage in Transit*.

Company.—1. The articles of a limited company provided that each member should have one vote for every ten shares, but should not have more than 100 in all, and that no member should vote except on shares which he had possessed three months. *Held*, that the vote of a shareholder whose name had been on the register three months should not be rejected on the ground that the shares represented by him were transferred to him by other large shareholders, for the purpose of increasing their own influence at the meeting, and that a shareholder was entitled to an injunction to restrain the directors from acting, on the ground that such vote was void.—*Pender v. Lushington*, 6 Ch. D. 70.

2. A company, organized under the Companies Act, 1862, obtained a lease from the plaintiff, and afterwards proceeded to wind up.

The company had assets. *Held*, that under § 158 of the Act, providing that "all claims against the company, present or future, certain or contingent, . . . shall be admissible to proof," the plaintiff was entitled to have set apart and invested in consols such a sum as, with consols at their present price, would be sufficient, with semi-annual rests at three per cent., to yield the amount of the rent.—*Oppenheimer v. British & Foreign Exchange & Investment Bank*, 6 Ch. D. 774.

3. Holders of debentures in a joint-stock company, which debentures pass from hand to hand by delivery, must produce them at or before a meeting called to vote upon a reconstruction scheme, in order to be entitled to vote at such meeting.—*In re Wedgewood Coal & Iron Co.*, 6 Ch. D. 627.

4. By the Companies Act, 1867, § 25, it is required that shares allotted shall be fully paid for in cash. P. & G., newspaper proprietors, contracted with an insurance company to print a series of advertisements for the company, in consideration of one hundred fully paid up shares. The shares were allotted to them, and the advertising subsequently done according to the contract. On the winding up of the Company, *held*, that P. & G. must be put on the list of contributories, the shares not having been paid for in cash within the sense of the Act.—*In re Church and Empire Fire Ins. Co. Pagin & Gill's Case*, 6 Ch. D. 681.

5. 30 & 31 Vict. c. 131, § 38, provides that "every prospectus of a company . . . shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus, . . . whether subject to adoption by the directors of the company or otherwise; and any prospectus . . . not specifying the same shall be deemed fraudulent on the part of the founders, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." The plaintiff took shares in the L. S. T. Co., in the prospectus of which the defendants, promoters of the company, had failed to insert two contracts, one between the defendants as promoters and the Duke de Saldanha, concerning the purchase of some con-

cessions from a foreign government, and the other between the defendants, C. & P., as promoters, and the defendant G., by which the former were to pay the latter a certain sum if he would procure them a certain contract with the company to be formed. The jury found these contracts material to be made known, that the plaintiff would not have bought the shares had they been inserted in the prospectus, and that the defendants acted in good faith in not inserting them, under the impression that it was not legally necessary to set them forth. *Held*, that the plaintiff could recover from the defendants, and the measure of damages was the sum paid for the shares.—*Theyeross v. Grant et al.*, 2 C. P. D. 469.

6. B., wishing to sell his colliery, had it valued in 1871. The valuers' estimate was £300,000; and B. promised them a commission of £80,000 if they sold the property at that figure. B. died in 1872; and his representatives offered his and their solicitors, D. & L., £1,500 if they would find a purchaser. In pursuance thereof, D. & L. saw R., a financial agent, who introduced them to C.; and an agreement was made between D. & L., representing the owners, and C., by which C. was to get up a company, with a capital of £300,000, to buy the colliery for £290,370, part cash and part bonds. If C. succeeded, he was to receive £85,000; if he failed, he was to forfeit £20,000. C., G., and R. made an agreement, unknown to the vendors and D. & L., by which G. should undertake all the risk of getting up the company, and should receive \$85,000, and C. should have £20,000, and therefrom pay R. £10,000. Subsequently, an agreement of purchase was executed between the vendors and G. B., as trustee for the proposed company, for the property at £290,370. At the same time an agreement was made between C. and the vendors, by which C. was to carry through the project for a company, which should take the property according to the agreement with G. B., and to receive from the vendors £85,000 therefor. The company was formed, R. procuring the directors. The prospectus and articles, drawn by D. & L., as solicitors of the company, referred only to the agreement between the vendors and G. B., as trustee for the company. This agreement was carried out, the vendors receiving the purchase money,

out of which they paid C. £85,000, of which he gave G. £85,000, R. £7,500, and kept £12,500 himself. Some time afterwards, the directors learned for the first time of these transactions, and brought suit against the vendors, R., C., G., and D. & L., to compel rescission of the sale, or payment to the company of the £85,000, less reasonable charges and commissions in getting up the company. The vendors compromised for £31,000, and the prayer for rescission was withdrawn. *Held*, that R., C., and G. were in a fiduciary relation to the company, and could not be allowed to profit from the agreement made without the knowledge of the company; that they should be allowed the proper expenses incurred in bringing out the company, but that commission was allowed them because the plaintiff had offered it in the bill, and not otherwise; that the compromise with the vendors in no way affected the case as against R., C., and G.; and that as against D. & L. the suit be dismissed, without their costs to the time of the compromise, and with their costs since that time.—*Bagnall v. Carlton*, 6 Ch. D. 371.

7. The memorandum of a company formed under the Companies Act, 1856, with a capital of 16,000 shares of £10 each, stated the company to be limited. The articles stated that a debt of £30,000 existed, for which six shareholders had made themselves liable; and if the funds of the company became insufficient to pay this debt and interest, each shareholder should pay the company a proportionate amount of the debt, "according to the number of shares held by" him. Only about 12,000 shares were ever taken. On an order to wind up the company, *held*, that the agreement to contribute was valid under the Act, in respect of fully paid-up shares, in spite of the declaration of limitation of liability that the amount to be paid in respect of each share was to be fixed according to the number of shares actually allotted, and not according to the whole number authorized; and if any shareholders were insolvent and unable to pay, the solvent ones were not liable for their proportion.—*In re Maria Anna & Steinbank Coal & Coke Co. McKewan's case*, 6 Ch. D. 447.

Concealment.—See *Company*, 6.

Condition.—See *Railway*.

Consideration.—See *Husband and Wife*, 2.

Contract.—Prior to November, 1871, B. & Co., colliery owners, had been in the habit of supplying coal to the M. Co., at varying prices, without any formal contract. In that month, pursuant to a suggestion of B. & Co. for a contract, a draft agreement was drawn up, providing for the delivery of coal on terms stated, from Jan. 1, 1872, for two years, subject to termination on two months' notice. The M. Co. prepared this draft agreement, and sent it to B., the senior of the three partners of B. & Co., who left the date blank as he found it, inserted the names of himself and his partners in the blank left for that purpose, filled in the blank in the arbitration clause with a name, made two or three not very important alterations, wrote "approved" at the end, appended his individual signature, and returned the document to the M. Co. The latter laid it away, and nothing further was done with it. Coal was furnished according to the terms of this document, and correspondence was had, in which reference was often made to the "contract," and complaints made of violation of it and excuses given therefor. In December, 1873, B. & Co. refused to deliver more coal. In an action for damages, they denied the existence of any contract. *Held*, that these facts furnished evidence of the existence of a contract, and that B. & Co. were liable for a breach thereof.—*Brogden v. Met. Railway Co.*, 2 App. Cas. 666.

Contributory.—See *Company*, 4, 7.

Conveyance.—See *Fraud*.

Criminal Process.—See *Injunction*, 1.

Damages.—See *Ancient Lights*; *Mine*, 1; *Specific Performance*, 1.

Debt.—See *Will*.

Devise.—A testatrix gave property to her daughter and her husband for their lives, and after the death of the survivor to the children of her said daughter who should be living at the testatrix's decease; but provided that, in case any of the children should die "without leaving lawful issue," the portion of those so dying should go to the surviving grandchildren of the testatrix that should "leave such lawful issue." *Held*, that the words "without leaving lawful issue" applied to the period of distribution; that is, the decease of the surviving tenant for life.—*Besant v. Cox*, 6 Ch. D. 604.

Director.—See *Company* 1.

Embezzlement.—See *Jurisdiction*.

Evidence.—See *Contract*; *Presumption*.

Executor and Administrator.—An executor or administrator stands in the relation of gratuitous bailee, and is not to be charged, either at law or in equity, for loss of goods, except through his wilful default.—*Job v. Job*, 6 Ch. D. 562.

Fiduciary Relation.—See *Company*, 6.

Foreign Ship.—See *Jurisdiction*, 1, 2.

Forfeiture.—Claim of forfeiture of the British ship A. for violation of the Merchant Shipping Act, 1854, § 103, sub § 2, in that the owner, on July 18, 1874, falsely represented that said ship had been sold to foreigners, in consequence of which representation she was stricken from the registry. A foreigner entered an appearance, and set up that, on July 6, he became the *bona fide* owner of said ship, without having any knowledge of the transactions alleged in the complaint. *Held*, that the forfeiture was immediate upon the false statement of July 18th, 1874, and a demurrer to the foreigner's statement of defence was sustained.—*The Annandale*, 2 P. D. 218; s. c., 2 P. D. 179.

Fraud.—S., the defendant, sold the plaintiffs a lot of land as freehold. It turned out, after the purchase-money had been paid, that almost the entire lot was copy-hold and not freehold. S. alleged that his statement that the land was freehold was *bona fide*. *Held*, that the sale must be set aside, and the purchase-money refunded with interest, and the plaintiff paid the expenses he had incurred in consequence of the misrepresentation. The defendant had committed a "legal fraud."—*Hart v. Swaine*, 7 Ch. D. 42.

Frauds, Statute of.—1. Defendants wrote and signed an offer for the lease of a theatre, which offer was attested by the owner's agent. The owner's name did not appear in the writing, which was addressed to "Sir," without more. The offer was accepted by the agent, by a letter signed by himself, but in which the names of the defendants did not appear. *Held*, that there was not a valid agreement within the Statute of Frauds, and the proposed lessees were not bound to specific performance.—*Williams v. Jordan*, 6 Ch. D. 517.

2. A party entitled to declare a trust on certain land wrote to the mother of her infant grandchild a letter, signed with the writer's initials, and inclosed in the envelope another

paper, headed "Supplement," beginning, "I quite omitted to tell you," &c., and unsigned. There was no reference in the letter proper to the "Supplement." *Held*, that the unsigned document was not a sufficient declaration of trust under the Statute of Frauds.—*Kronheim v. Johnson*, 7 Ch. D. 60.

See *Lease*; *Specific Performance*, 1.

Guarantee.—See *Husband and Wife*, 2.

Husband and Wife.—1. A husband and wife, married since the Married Woman's Property Act, 1870, gave a joint and several promissory note. The husband took the money, and afterwards became bankrupt. *Held*, that the wife's separate property was liable on the note, and there was no necessity to make the trustees of her estate parties.—*Davis v. Jenkins*, 6 Ch. D. 728.

2. The wife of C., a retail trader, who was possessed of separate estate in her own right, without restraint to anticipate, gave a guarantee in writing to the plaintiff, a dealer with whom C. traded, as follows: "in consideration of you, M., having at my request agreed to supply and furnish goods to C., I do hereby guarantee to you, the said M., the sum of £500. This guarantee is to continue in force for a period of six years, and no longer." C. had previously dealt with M., and at the time of the guarantee a bill of exchange drawn by M. on C. for a balance had been dishonoured, and another bill was soon coming due. *Held*, that the guarantee applied to any moneys to the extent of £500 which should be due during six years, including the dishonoured bill; that the fact that goods were furnished subsequently created a good consideration to the wife for the guarantee; and that the separate estate of the wife was liable for any balance due M. from C., to the extent of £500.—*Morrell v. Cowan*, 6 Ch. D. 166.

Injunction.—1. Where a statutory board has power to recover a penalty by criminal proceedings for violation of a statute regulation, a court of equity will not interfere by injunction to restrain those proceedings.—*Kerr v. Corporation of Preston*, 6 Ch. D. 463.

2. W. sold S. land adjoining other land of W., under which there were mines. S. purchased the land for the purpose of erecting heavy buildings for an iron foundry thereon, and W. was aware of this fact. Subsequently W. leased the mines to H. & Co., who began mining. S. hav-

ing begun to build on his land, applied for an injunction against W. and H. & Co., to restrain the working of the mines in a manner to endanger the support of his buildings. *Held*, that S. was entitled to an injunction.—*Siddons et al. v. Short et al.*, 2 C. P. D., 572.

Innkeeper.—By 26 & 27 Vict. c. 41, § 1, no innkeeper is liable for loss of the goods of a guest beyond £30, except where such goods shall have been lost through the wilful neglect of such innkeeper, or any servant in his employ. Section 3 requires every innkeeper to keep section 1 posted in a conspicuous place in his inn, in order to entitle him to the benefit thereof. The defendant had what purported to be section 1 posted properly in his inn; but by an unintentional misprint, it read thus: "Through the wilful default or neglect of such innkeeper, or any servant in his employ." *Held*, that the misprint was material, and the innkeeper was not entitled to the benefit of the statute.—*Spice v. Bacon*, 2 Ex. D. 463.

Jurisdiction.—The court declined jurisdiction where a foreigner brought an action for co-ownership against a foreign vessel, and another foreigner appeared to have the petition dismissed, and the consul of the State where the ship was registered declined to interfere.—*The Agincourt*, 2 P. D. 239.

2. Suit between two foreigners over a foreign vessel, where the court, under the circumstances, assumed jurisdiction for a particular purpose.—*The Evangelistria*, 2 P. D. 241.

3. A clerk employed to collect money, and remit it at once to his employers, collected several sums at a place in Yorkshire, subsequently wrote two letters to his employers in Middlesex, without mentioning the above collections, and afterwards, a letter, intended, as found by the jury, to lead his employers to think that he had collected no money in Yorkshire. *Held*, that he could be tried for embezzlement in Middlesex, where the letters were received.—*The Queen v. Rogers*, 3 Q. B. D. 28.

Lease.—Written agreement by the defendant with the plaintiff, duly signed by both, for the lease of a house for a certain term and price named. It was recited that "this agreement is made subject to the preparation and approval of a formal contract," but no other contract was ever made. *Held*, that the agreement was only preliminary, and the defendant was not bound

to specific performance.—*Winn v. Bull*, 7 Ch. D. 29.

Libel and Slander.—An editor had been convicted of stealing feathers, and had been sentenced to twelve months' penal labour as a felon, which sentence he had duly served out. Afterwards, a brother editor called him a "felon editor," and justified by asserting the above facts. Replication, that as he, the convict, had served out his sentence, he was no longer "felon." On demurrer, *held*, a good reply.—*Leyman v. Latimer*, 3 Ex. D. 15.

Lien.—See *Attorney and Client*.

Mine.—1. Defendant, a mine-owner, diverted the natural course of a stream for his own purposes; and, in an unusually heavy rain which followed, the water overflowed the new channel, and caused damage to an adjoining mine, belonging to the plaintiff. *Held*, that defendant might be liable therefor, although if the injury had happened in the ordinary course of working the mine, from a sudden and unusual natural cause not to be foreseen by a prudent person, no liability would have arisen.—*Fletcher v. Smith*, 2 App. Cas. 781.

[To be continued.]

GENERAL NOTES.

MR. CHITTY relates an anecdote of a young attorney who had been carrying on a correspondence with a young lady, in which he had always, as he thought, expressed the greatest caution. Finding, however, that he did not perform what he had led the lady to believe that he would, she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded—"this, *without prejudice*, yours faithfully, C. D." The judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend to prejudice the lady; and the jury found accordingly.

MARRIED OR NOT MARRIED?—A curious question has arisen as to Lord Rosebury's marriage. The *Solicitors' Journal* points out that if, after the marriage at the Registrar's, they were described in the parish register of the Episco-

pal Church, where the marriage was repeated, as bachelor and spinster, there is a false entry. A nobleman was indicted in 1850 for having, on a similar re-marriage with a lady, described himself as a widower and his wife a widow. But the judge said it was difficult to say that it was 'wilfully and corruptly,' and the jury found a verdict of 'not guilty.'

MEXICAN LITIGATION.—Few nations are so fond of litigation as the Mexicans; and there is a story which pertinently illustrates the propensity of the Dons for going to law with each other. Don Rafael has been suing Don Esteban for at least ten years in all the courts of the Republic. Over and over again he has lost his cause, and as often has he appealed from the court below to the court above. One day the plaintiff meets the defendant in the Calle San Francisco, Mexico. The adversaries bow stiffly to one another. "How is it, Don Rafael," asks Don Esteban, "that you have not yet carried before the Supreme Court your appeal against the Court of Guadalajara, which, if you remember, was adverse to you?" "Of a truth," replies Don Rafael, "I shall appeal no more, and abandon my claim. I am sick and tired of the whole affair; and, moreover, I have not a single dollar left to pay costs withal." "Is that so, *caballero*?" quickly returns Don Esteban, pulling out his purse. "Pray do me the honour to accept the loan of fifty dollars, and give notice of appeal at once. It would be a shame and a scandal to let such a fine lawsuit die."

THE PETTY JURY SYSTEM.—At Ballinakill quarter sessions Ellen Moore was indicted for having stolen a shawl. Evidence sustaining the charge having been given, his worship charged the jury, who retired. After a considerable lapse of time one of the jurors came out of the room and was leaving the court. His worship observed the man, and directed the Deputy Clerk of the Peace to ask if he was a juror. Juror.—Yes, sir. Deputy Clerk of the Peace.—Where are you going? The Juror.—Ah, begor, I wouldn't stay there; they're all boxin' and fightin' inside. (Laughter). The juror was then ordered back to the room, and a constable placed on the door. The prisoner was found guilty, and on the jury being discharged, one of them was heard to say, 'Only I threatened to lick him he'd never agree.'

The Legal News.

VOL. I. MAY 25, 1878. No. 21.

EMPLOYER AND WORKMAN.

The rule that a workman has no action against his employer for injuries received in the performance of his duty, has been sustained by the English Courts in a long series of decisions. Some of the principal cases referring to the point will be found on turning back to page 159 (No. 14). Of late, however, some have wished to relax the rule a little in the case of railway companies, and to make them liable for the injuries sustained by their employees. The London correspondent of the *Gazette* notices the proposed change as follows:—

"Another topic that is being fully ventilated is the propriety of making railway companies liable for the injuries received by their servants. Now the latter are entitled to no compensation for such injuries, a case, which is considered conclusive, having been decided some years ago, in which the learned judges ruled that in the absence of an express contract to the contrary there was an implied contract between employer and servant that the former should not be liable for damages received by the latter in the performance of his duty. The grounds upon which this decision was based have since been admitted to be wrong, but the decision stands nevertheless, the liability of an employer to a stranger for injury caused by his servant being an exception to the general rule, and not a part of the common law. The railway servants demand to be put on the same footing as the public, and they have the able advocacy of Mr. Lowe on their side, but it is extremely doubtful whether they will gain their object, especially as the bill for improving their legal position was talked over just before the recess, and the question has assumed so difficult an appearance that no one seems inclined to revive it."

There seems to be no insuperable objection to the proposed alteration of the law. If it were carried out, the companies would become in point of fact the insurers of their employees against accidents, and, if appreciable at all, the

effect probably, other things being equal, would be simply to reduce the wages paid to railway servants by so much as would cover the increased risk to the employer. Against the change, it might be urged that there is no occasion for legislating in the interest of a class, seeing that accident insurance companies stand ready, for a small consideration, to afford the insurance desired by employees.

FORENSIC ELOQUENCE.

The style of speaking in the English House of Commons, as everybody is aware, has changed very greatly within less than a century. The impassioned oratory of Pitt's time is heard no more, and the Commons does its business for the most part in a very matter-of-fact way, with but little toleration and less respect for set speeches. Equally striking, according to the *Edinburgh Review*, is the change which may be observed in the style of speaking in the English Courts. Noticing Sumner's statement, that he had "heard a style of argument before the Supreme Court at Washington superior to anything he had heard in London," the *Review* says:—"We are unable to make the comparison. But there has long been at the English bar an aversion to oratorical display, except on very rare occasions which seem to admit of it; and, on the whole, the business of our courts is conducted in a very plain, matter-of-fact way which may have seemed tame to an American ear, especially to Sumner, who had in him the instinct and powers of an orator. Indeed, we fear that if he could now renew his visits to Westminster Hall he would not find that an interval of forty years has raised or improved the intellectual, legal, or oratorical powers of those who preside or argue there. On the contrary, with some few exceptions, he would find, we regret to avow it, a great and palpable decline. On the bench he would look in vain for the strength, the concentration, the learning, the masterful authority of those earlier days. At the bar he would seek in vain for eloquence, or even advocacy, of the highest order, and he would learn with extreme surprise that one of the most eminent members of the English bar in 1878—a man without a superior, and almost without a rival—was the *ci-devant* Secretary of State of the Southern Confederacy. More

serious still is the fact that the status of an English judge has notably declined. The great augmentation in the number of judges, the divisions of the courts into upper and lower ranks, the abolition of peculiar courts, and the modern habits of the judicial body, have concurred to extinguish that rare and almost sacerdotal dignity which from an early period of our history had clung to the King's judges. They are now regarded as magistrates—respected but not revered."

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, April 30, 1878.

TORRANCE, DORION, PAPINEAU, JJ.

THIBAudeau *et al.* v. JASMIN & GENDRON.

[From S. C. Richelieu.

Affidavit for Writ of Compulsory Liquidation—Security held for Debt.

Held, that it is not necessary that the affidavit under Section 9 of the Insolvent Act of 1875 should state that the debt is not secured.

The defendant Gendron complained of a judgment rendered against him by the Superior Court, Richelieu District, for \$827. The proceedings began by the issue of a writ of compulsory liquidation. The defendant, among other objections, urged that the affidavit under which the writ issued, was null, as it omitted to state what guarantee was held by the plaintiffs for their debt.

TORRANCE, J. There are several judgments of the Superior Court in which this objection was made: *inter alia*, *Barbeau v. Larochelle et al.*, 3 Q. L. R. 31; but the judgment in that case was reversed in appeal, and is reported at p. 189 of same volume (1 LEGAL NEWS, 178.)

Judgment confirmed.

E. Lareau for plaintiffs.

Barthe & Co., for defendant Gendron.

TORRANCE, DORION, RAINVILLE, JJ.

MARIN v. BISSENETTE, & BISSENETTE, opposant.

[From S. C. Iberville.

Donation, Mode of Questioning Validity of.

Held, that a deed of donation may be set aside on contestation of the opposition filed by the donee invoking such deed.

The plaintiff, in order to obtain payment of a money condemnation against the defendant, took in execution a piece of land which was in contest in the case. The opposant, daughter of defendant and living with him, claimed the land as her property under a deed of donation from her father, 15th August, 1876. The plaintiff contested the opposition, and demanded the nullity of the donation on the ground of fraud against the creditors of the donor. The contestation was maintained by the Court at Iberville.

TORRANCE, J. There are two points of importance in the case. The opposant contends that the contestation comes too late, owing to the opposant having obtained a prescriptive title under C. C. 1040, which requires the creditor to bring his suit within one year from the time of his obtaining a knowledge of the fraud. The Court has decided that the facts proved do not bring the case within the rule, as it is only proved that the plaintiff had heard of the transfer. We think that the judgment in this respect is unassailable. The opposant further contended that the validity of the donation could only be tested by a revocatory action. The Court on this point was also against the opposant. It was so decided long ago in the case of *Cumming et al. & Smith et al.*, 5 L. C. J., 1, where the contestation prayed that the deed should be set aside, and the conclusions were such as to enable the Court to do justice between the parties as fully as in an action purely in form revocatory or *actio Pauliana*. We see no injustice in confirming the judgment, being satisfied that the pretended deed of donation is fraudulent and should be set aside.

Judgment confirmed.

Jett & Co., for opposant.

Doutre & Co., for plaintiff, contesting.

SUPERIOR COURT.

Montreal, April 30, 1878.

MACKAY, J.

WILSON v. CITY OF MONTREAL.

Illegal Assessment—Action for Restitution—Interest.

Held, that a person who pays money for assessment under an assessment roll made by Commissioners after the time appointed for them to report, and when they were *functi officio*, is entitled to restitution.

2. It is not necessary under such circumstances that the Court should declare the assessment roll null, or that the roll should be before the Court.

3. Interest on money so illegally paid runs only from the date of the demand of restitution.

The declaration asked for the setting aside of an assessment roll, and that defendants be condemned to pay plaintiff \$1,823.99, with interest and costs. It alleged that on the 27th July, 1868, commissioners in expropriation were appointed for the widening of Place d'Armes Hill; that they were to report on September 15, and the delay was extended to October 10. That on November 20, long after their powers had ceased, the commissioners made an assessment roll, distributing the cost of the improvement, and assessing plaintiff \$1,236 31. He paid it to avoid an execution, and now sought to recover it.

The plea denied plaintiff's allegations, and set out that he was benefitted by the improvement, and never complained of the roll, which was duly confirmed.

PER CURIAM.—The payment to defendants is proved; it was a payment under protest. As to whether the money was a debt due by law to defendants, it was so, of course, if the assessment roll referred to could be seen to have been made by the Commissioners within their powers, and within the time fixed for their operating. The Commissioners' appointment conferred office on them only for a time, that is, up to Sept. 15. Was that time extended by authority? Plaintiff says so, but he says no more than that it was extended to Oct. 10. Nothing appears from which we can say that beyond this date the Commissioners had power or office; yet the assessment that plaintiff paid was upon a roll made by those Commissioners only in November. This was too late.

Much has been written in the last thousand years on error of law and error of fact, and on error or mistake as ground for rescinding agreements, or reclaiming money paid. Writers on the subject have in all times differed. Even texts of the Roman law on the subject seem contradictory. See Savigny; Thibaut; Smith's Leading Cases; Kent's Comm. Under the English and American systems of law the case of defendants would prevail; but I do not see how the English or American systems can control this case. We have law of our own, and it cannot be put out of mind, or made to cede

to other law. I refer to our Civil Code 1047, which I read by the light of the commentators, for instance, of Marcadé, vol. 5, pp. 254 et seq. The assessment money paid by Wilson was not due to any body; the defendants must restore it. I see it has been held so in Scotland, in a case like this one.

As to my declaring the assessment roll null and void, largely, as prayed, I cannot do that, in the absence of the roll, nor is it absolutely required that I should do this to enable me to order the restitution of the money in question. I see enough upon the issues as formulated and the proofs in so far as the parties have made proofs, and (I may add) abstained from making proofs, to compel me to say that it appears that Wilson's money was paid as an assessment imposed upon him upon the operation of the assessors made outside of the time within which it was competent to them to operate. Plaintiff does show *prima facie* that the Commissioners were *functi officio* when they made the assessment roll. If they were not after the 15th Sept. they were after 10th Oct.

A question of some importance remains, that of interest. The plaintiff is entitled to interest, but from what date? He remained seven years and a half inactive, and then first asks defendants to repay him his money, with interest from time of payment. Our Code bars demand for all arrears of interest over five years. But the law also enacts for a case like this, that interest only runs from demand, for the defendants were in good faith. (5 Marcadé, 258.) They supposed that the money was due to them. The Commissioners erred in form, so the money was not due, not a lawful debt. A quasi contract resulted from all that passed, obliging defendants to repay, but only on demand. No demand was made until this suit was brought, so interest can only be allowed from service of process. The like was ruled in *Brunelle v. Buckley*, which went through three Courts.

E. Barnard for plaintiff.

R. Roy, Q.C., for defendants.

JOHNSON, J.

DAWES v. FULTON *es qual.*

Assignee, Action against—Insolvent Act, Section 125.

Held, that the ordinary hypothecary action cannot

be exercised against an assignee who is in possession of immoveable property of an estate in his quality as such.

JOHNSON, J. The defendant is assignee of the insolvent estate of William Henderson, who purchased from the plaintiff, in October, 1872, five lots of land for the sum of \$2,855, paying down \$713, and undertaking to pay the balance in four annual instalments with interest, and hypothecating the land for security. The balance now due is \$1,955. In July, 1875, Henderson made an assignment to Mr. James Tyre, and the defendant was subsequently elected by the creditors. In November following Henderson got a deed of composition and discharge from his creditors, and, in addition to the sum that they agreed to take, he assumed all hypothecary claims on his real estate; and the assignee was to reconvey everything except the immoveable property, which was to remain vested in him as collateral security for the performance of all the other conditions of the deed. He has remained in possession ever since, and the object of the present action is to get a *délaissement*, or make him pay to the plaintiff the balance of the price of the land. There is a demurrer to this declaration; and it was ordered to stand until the merits. The grounds of it are, first, that the action as taken is prohibited by the 125th section of the Insolvent Act; and secondly, that, under the allegations of the plaintiff, even if the right of bringing an ordinary action existed, it is made apparent that the defendant's possession, in his quality of assignee, has a character given to it by the deed of composition which would prevent the exercise of the hypothecary action, and deprives him of the means of making a *deguerpiissement* as an ordinary proprietor, as he holds as he does only in virtue of his office, which subjects him to the operation of the Insolvent Act. It appears to me quite undeniable that the defendant holds only as assignee, and has certain duties imposed upon him in respect of this property as such, and only as such. He is sued as assignee, and to a certain extent is still accountable to the creditors. The 125th section subjects him to the summary jurisdiction of the Court, as one of its officers; and it enacts also in express terms that "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property

"upon any effects or property in the hands, possession or custody of an assignee may be obtained by an order on summary petition; and not by any suit or other proceeding what-ever." The remedy therefore here is not an hypothecary action in the ordinary form as taken in the present case; but it is to ask for an order that the assignee be authorized to sell the property; and under the demurrer the action is dismissed with costs. It was urged that an order had been made in the Insolvent Court at variance with this view of the law; but I have looked at that order which was made by myself, and I only find it ruled there that property seized upon Henderson was seized *super non domino*, which does not in the least conflict with the denial of an ordinary right of action against an assignee who is subject by law to the summary jurisdiction of the Court.

Benjamin for plaintiff.

A. & W. Robertson for defendant.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 240.]

2. A mining company sank a pit, and intercepted underground water, which had previously flowed in an unascertained course, and threw it upon the land of a neighbour. The water had previously, when left to flow underground of itself, come out upon the neighbor's land. *Held*, that the mining company was liable for the damage.—*West Cumberland Iron and Steel Company v. Kenyon*, 6 Ch. D. 773.

Misprint.—See *Innkeeper*.

Navigable River.—The right of navigation in a river above tidewater, acquired by the public by user, is, as regards the owner of land through which the river flows, simply a right of way; and the owner of the land may erect a bridge over the river, provided it does not substantially interfere with the right of way for navigation. The property in the river-bed is in the owner of the land.—*Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

Negligence.—See *Mine*, 1; *Telegraph*.

Partnership.—In September, 1871, C. gave bonds, in accordance with the rules of *Lloyd's*, to enable his son W. to become a member thereof, as he the same month did, carrying on the business in his own name exclusively. In January, 1872, an agreement was made pur-

porting to be between father and son, but executed only by the son, reciting that the father had given the bonds as above, and had also loaned the son £200; and, in consideration thereof, the son covenanted with the father that one H., and no other, should underwrite in W.'s name, and should be paid £200 a year and one-fifth the net profits; that C. should be at liberty to cancel the bond at any time, on notice to C. and H.; that O. should not spend more than £200 a year till he paid his debts; that one-half the net profits, deducting H.'s share, and £25 a year, should belong to C.; that W. should not endorse or speculate until he paid his debts; that W. should repay C. the £200 and interest on demand; that W. should keep a separate account, as underwriter, which should be liable to inspection by C.; and that the profits of business should not be touched before they amounted to £500, and then, with C.'s consent, an agreed sum might be withdrawn on account of W., and a like sum for account of C. None of the creditors knew that the father had anything to do with the business. The son also carried on two other distinct businesses in his own name. In bankruptcy proceedings against the son, *held*, that the father was not a partner in the underwriting business.—*Ex parte Tennant. In re Howard*, 6 Ch. D. 303.

Patent.—In 1865, a patent for skates was granted in England. Two years before, a foreign book, giving a general description of the invention, was sent to the library of the Patent Office. A few weeks before the granting of the patent, another foreign book, containing a drawing of the invention, was sent to the library. The book was not catalogued, but was in a room open to the public, where a librarian testified that he once noticed it before the date of the patent. *Held*, not to be prior publication.—*Plimpton v. Spiller*, 6 Ch. D. 412.

Presumption.—A respectable farmer and church elder courted a young lady for some years, and they were finally, in 1850, married, while she, to his knowledge, was in an advanced stage of pregnancy. Seven weeks afterwards, she was delivered of a daughter. The matter was kept secret, and the child removed to another part of the country, where the husband supported her till she became able to support herself. In 1875, the girl claimed

to be his daughter; and he brought this action to have it declared that she was not. Both husband and wife swore to that effect; and the wife told two different stories to account for her pregnancy. *Held*, that the presumption of paternity against the husband was, under the circumstances, almost irresistible, and that the burden was on him to show affirmatively the contrary, and this he had failed to do.—*Gardner v. Gardner*, 2 App. Cas. 723.

Privity.—See *Telegraph*.

Profits.—See *Partnership*.

Public Worship Act, 1874.—1. The Arches Court of Canterbury found the Rev. O. J. Ridsdale to have offended against the ecclesiastical law, in that (1) he wore, during the service of holy communion, vestments known as an alb and chasuble; (2) he said the prayer of consecration in the communion service while standing, so that he could not be seen by the people to break the bread and take the cup in his hand; (3) he used in the communion service wafer bread, instead of bread such as is usually eaten; (4) he placed and retained a crucifix on the screen between the chancel and the nave or body of the church. On appeal to the Judicial Committee of the Privy Council, *held*, that the first and fourth charges were established, and the judgment of the Arches Court should be affirmed; and that the second and third findings were not sustained by the form in which the charges were made, and should be disallowed. A very full historical discussion of the ecclesiastical law and practice applicable to the case.—*Ridsdale v. Clifton*, 2 P. D. 276.

2. A reredos made of Caen stone, of which the central compartment showed the Saviour on the cross and the figures of St. John and the three Marys, all carved in relief, was set up in a new church. The bishop refused to consecrate the church until it was taken down. This was done, and the church consecrated. On petition for leave to replace the same, *held*, that the petition should be granted.—*Hughes v. Edwards*, 2 P. D. 361.

Publication.—See *Patent*.

Railway.—A railway company contracted to carry cattle from Ireland to Huntingdonshire, in England. The railway company employed a steamer not belonging to the company, nor worked by it, to convey the cattle from Dublin

to Liverpool. On the voyage, the cattle were lost through the negligence of the master and crew of the steamer. The form of contract employed by the railway company declared that the company would not be liable for loss or damage arising from such negligence, or from any accident whatever incident to navigation. *Held*, that, under the scheme of legislation made up of the Traffic on Railways and Canals Act, 1854 (17 & 18 Vict. c. 31), the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), the Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), and the Railways Regulation Act, 1871 (34 & 35 Vict. c. 78), these conditions embodied in the contract were unreasonable and void; that the company was liable exactly as it would have been had it been the owner of the vessel; and that it could not set up as a defence in a suit like this for damages its own illegal action in working a steamboat. —*Doolan v. The Midland Railway Co.*, 2 App. Cas. 792.

Sheriff.—*Held*, that a sheriff had made in substance a levy, and was entitled to his poundage and fees, where he went to the debtor's house with a warrant and demanded payment, and told the debtor he should go on to sell if the amount was not paid, and the debtor paid.—*Bissicks v. The Bath Colliery Company, Limited*. *Ex parte Bissicks*, 2 Ex. D. 459.

Shipping and Admiralty.—In an action of co-ownership in a vessel against J. H., formerly sole owner, G. W. alleged and proved that a bill of sale of a moiety of the vessel from J. H. to T. W. was duly registered, and that G. W. had purchased and paid for that moiety, receiving therefor a bill of sale from T. W., which was also duly registered. J. H. stated in defence that he never gave a bill of sale of or sold said moiety, and, if registration thereof had been made, it was fraudulent. *Held*, that the plaintiff, being a *bona fide* holder for value, was not affected in his rights by the alleged fraud; and his demurrer to that part of the defence alleging fraud was sustained. —*The Horlock*, 2 P. D. 243.

Slander.—See *Libel and Slander*.

Solicitor.—See *Attorney and Client*.

Specific Performance.—1. An agreement for a lease for thirty years was duly executed Sept. 5, 1876; but it did not state when the lease was to begin. It appeared that the proposed

lessor knew the purpose for which the premises were leased and to be used; but he refused to complete the lease, and the lessee was kept out for a good many weeks. On a suit for specific performance and for damages, *held*, that the agreement was a sufficient memorandum under the Statute of Frauds, and under it the lease must be held to commence immediately, and that there must be specific performance and damages for the plaintiff's loss of profits in the business which he leased the premises to carry on, during the time he was kept out.—*Jacques v. Miller*, 6 Ch. D. 153.

2. Dec. 23, 1861, M. took a lease from A. of certain premises for ten years, with the option in M. at any time during the term to purchase the premises for £3,500, upon payment of which to A. the lease should determine, and M. should be entitled to an assignment thereof. Jan. 23, 1863, A. mortgaged the premises to G. In July, 1867, after some negotiations looking to a purchase by M., the latter, by his solicitor, gave notice to A. and G. that he intended to purchase. A draft of a conveyance of the premises to M. was prepared, but was not completed, owing to a failure between A. and G. to agree as to whom the purchase-money should be paid. This was the subject of a correspondence between July, 1867, and March, 1868. In July, 1868, G. gave M. notice to pay the rent to him; and M. made him some payments at odd times, the receipts whereof, both before and after the date for the termination of the lease, were generally expressed to be for rent. In Nov., 1872, A. went into bankruptcy; and, May 1, 1873, the trustee in bankruptcy informed M. that he proposed to sell the premises, and gave M. the first chance. M. said nothing about having already agreed to purchase until after a second interview, when he set up the claim, and in July, 1873, filed his bill for specific performance. Therein he set up the additional fact, that he had, with the knowledge of both A. and G., expended about £300 in improvements on the premises since 1867. *Held*, that the optional clause in the lease, followed by the notice given in 1867, formed a good contract; but that M., through his delay in acting from March, 1868, to May, 1873, had lost his right to specific performance, and the fact that he was in possession did not alter the case, as he was in during that time, not under the

contract as purchaser, but as tenant under the lease.—*Mills v. Haywood*, 6 Ch. D. 196.

Stoppage in Transit.—W., a trader in Falmouth, purchased goods of B., a merchant in London. On Oct. 27, 1876, B. sent an invoice to W. The goods were put on board the same day. The steamer sailed October 29, and arrived at Falmouth October 31, when the goods were put into the warehouse of C., wharfinger and agent of the steamer company. In the evening of October 30, or the morning of October 31, the bill of lading arrived. October 30, W. absconded, and, November 4, he was adjudged bankrupt. The same day, B. telegraphed to C. not to deliver the goods. It appeared that C. was in the habit of receiving goods and holding them at the risk of the consignee, and that he had the exclusive right as against the steamer company of delivering the goods. One condition of delivery was, that the freight should be paid. C. testified that he considered himself in all cases the agent of the consignee from the time of the arrival of the goods on the wharf. *Held*, that the goods were still in transit when B.'s message arrived. C. was not agent of the consignee.—*Ex parte Barrow. In re Worsdell*, 6 Ch. D. 783.

Telegraph.—*Held*, affirming the decision of the Common Pleas Division, that an action cannot be maintained against a telegraph company by the receivers of a telegram, for negligence in the delivery thereof, in consequence of which negligence the receivers suffer damage.—*Dickson v. Reuter's Telegraph Co.*, 3 C. P. D. 1; s. c. 2 C. P. D. 62; 1 Legal News, 37.

Vendor and Purchaser.—A tenant for life without power to lease undertook to grant a sixty years' lease at 6d. rent, with a covenant for quiet enjoyment, the lessee to erect a house, as he in fact did. The lessee died, and his son paid rent to H., who had come into possession of the fee. Subsequently, H. conveyed the property to the plaintiff, subject to the sixty years' lease, which he supposed valid. The plaintiff sued for immediate possession. *Held*, that he was entitled.—*Smith v. Widlake*, 3 C. P. D. 10.

Watercourse.—See *Mine*, 2.

Will.—1. Testator left £6,000 in trust for his two daughters J. and A., for their respective lives, in equal moieties, and "from and immediately after the several deceases of each of

them, leaving lawful issue or other lineal descendants or them surviving," upon trust to pay, assign, and transfer the principal fund "of her or them so dying unto her or their child or children, or other lineal descendants, respectively, . . . such child or children, or other lineal descendants, to take *per stirpes* and not *per capita*, . . . to be paid . . . to them respectively when and as they respectively shall attain the age of twenty-one years." The income to be applied meantime, if necessary, for their support; "nevertheless, the . . . shares of the said child or children," in the principal, "shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents." In case a daughter should die without leaving "issue or lineal descendants her surviving," there was a gift over to the other daughter and her issue and lineal descendants, in similar form; and, in case both daughters should so die, a gift over to third persons. *Held*, that the children of a daughter who died before their mother's death did not take.—*Selby v. Whittaker*, 6 Ch. D. 239.

2. Testator began as follows: "As to my estate, which God has been pleased in his good providence to bestow upon me, I do make and ordain this my last will and testament as follows (that is to say)." He then devised a farm; then, in an informal way, another farm; he then made seven money bequests and a gift of shares in a company, gave his executors £100 each, and made M., R., and O. his "residuary legatees." He possessed other freehold lands besides those mentioned in the will. *Held*, that such lands passed to M., R., and O., as "residuary legatees."—*Hughes v. Pritchard*, 6 Ch. D. 24.

3. Testator gave his brother J. S. all his real and personal estate, with full power to give, sell, and dispose of it in any way he should see fit, and appointed him sole executor. The will then proceeded thus: "But provided he shall not dispose of my said real and personal estate, or any part thereof, as aforesaid, then, and not otherwise, I do hereby give, devise, and bequeath my said real and personal estate, or such part or parts thereof as he shall not so dispose of, in the manner following." The testator then proceeded to dispose of his property by a series of trusts, entails, and

contingent remainders; and, after some specific legacies, gave to H. and D., two of the beneficiaries, the household furniture, &c., to hold in trust as heirlooms for whoever should succeed under the provisions of the will to the property in the house; gave the residue of his property to the said H. and D., upon trust to sell and convert "with all convenient speed after the death of the survivors" of himself or his said brother J. S. and the said H. and D. were, in this part of the will, appointed executors. The expression, "the survivor of myself and my said brother" J. S., occurred in several places in the will. J. S. died in the testator's lifetime. *Held*, that the gift to J. S. was a gift for life, with power of appointment and a gift over on J. S.'s failure to appoint, or on his death in testator's lifetime; and this latter event having happened, the gift over took effect on the death of the testator.—*In re Stringer's Estate. Shaw v. Jones-Ford*, 6 Ch. D. 2.

4. A testator recited that his son had become indebted to himself in various sums, and bequeathed to the son the sums mentioned, and released him from payment thereof. Between the date of the will and testator's death, the son became still further indebted to the father. *Held*, that these sums were not covered by the will, under the Wills Act (1 Vict. c. 26).—*Everett v. Everett*, 6 Ch. D. 122.

5. A testator gave, devised, and bequeathed "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle J. M." to the defendants. He bequeathed to the plaintiff the residue of his personal estate. Between the date of the will and the testator's death he received £800 from his uncle's estate, and invested £800 thereof in railway stock. He purchased before his death £3,500 more of this stock; and at his death the whole £4,100 stock was standing in his name. *Held*, that the defendant was entitled to the £800 stock.—*Morgan v. Thomas*, 6 Ch. D. 176.

6. A testator provided that his residuary estate should be divided into sevenths, gave one-seventh to each of his two sons absolutely, and the remaining five-sevenths to trustees to pay the income to his five daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, during their respective lives, in equal shares. Upon the decease of Elizabeth, the trustees should pay

one-fifth of the fund to the children of Elizabeth; upon the decease of Sarah, one-fifth to the children of Sarah; upon the decease of Eliza, one-fifth to the children of Mary; and upon the decease of Hannah, one-fifth to the children of Hannah. The testator made mention in a subsequent part of the will "of the issue of any of" his daughters, without discriminating. *Held*, that the will must be construed by interpolating a provision for the children of Eliza on her death similar to that made for the others, and a clause stating that the provision for the children of Mary should take effect on the death of Mary, instead of on the death of Eliza.—*In re Redfern. Redfern v. Bryning*, 6 Ch. D. 133.

THE EARLY FRENCH BAR.

In the earlier period of the French bar the proceedings in the ecclesiastical courts were conducted wholly in the Latin language; in the secular courts the vulgar tongue alone was used; but the technical terms of the law, the pedantry and affectation of lawyers and judges rendered their speech nearly, if not quite, incomprehensible to the public at large; so that the French that was heard in the courts was as different from that of the common people as was that of the prioress of Chaucer:

"And French she spake full fayre and fetisly,
After the scole of Stratford atte Bowe,
For French of Paris was to hire unknowe."

Thus when, in 1393, the kings of England and France were treating for a truce, the English commissioners could not understand the language of the French lawyers who represented their adversary; and Froissart says that the English excused themselves in the discussion by saying, "that the French which they had known from infancy was not of the same nature and condition as that which the clerks of law used in their treaties and proposals." As the English of the higher classes of that day, such as would be selected for agreeing on a truce with the enemy, generally understood French quite as well as their own language, it would seem that the dialect of the bar of which they complained must have been peculiarly barbarous and uncouth. Such, however, was the fashion of the age; science and learning of

all kinds veiled themselves in obscurity, and sought to enhance the popular respect by an air of profound mystery.

At a time when the spiritual courts engrossed a large part of the legal business of the country, and when causes in the civil courts were often tried by wager of battle, the demand for lawyers was limited; the functions and station of lawyers were somewhat uncertain, and the bar could hardly claim the dignity of being a separate institution. In the ecclesiastical courts, the preparation, management and trial of causes was entrusted to persons who had taken clerical or priestly orders; a class of men who, however, not being content with this exclusive privilege, appeared also as advocates in the secular courts, notwithstanding there was a rule, more often broken than kept, which forbade them to appear except in their own courts, unless in cases where the interests of the church were concerned; a wide and vague exception, since it might be asserted that the church was concerned in all questions touching good morals, which are in some way involved in nearly every judicial proceeding. The superior learning of the clergy, joined to the veneration in which they were held by the people, gave them great advantages in enabling them to intrude themselves into the secular courts, where they affected to appear less in the guise of partisans than as defenders of morality and religion. Some of these made the practice of law a regular pursuit; they possessed ability and sometimes achieved distinction; at least one of them became a bishop and another a pope. They had a double chance of promotion, from the crown and from Rome. Since we perceive that the secular lawyers adopted the style of the spiritual brethren, and accepted their canons of taste, there is reason to suppose that the influence of the latter outweighed that of the former; but there is but little or no evidence extant of any hostility growing out of the rivalry of these two orders, which might otherwise have been brought forward as a reason for the fact that in all the subsequent and long protracted struggles between the crown and the Roman See, the bar uniformly ranged itself on the side of the crown. At first, no doubt, the clergy found a pretty easy victory over lawyers deficient in learning, practicing before ignorant courts; but as the laws and recognised customs

of the country increased in number, and grew more diversified in detail, it became more and more difficult to keep up with the rules of decision under two different codes of laws; the result of which was that the clergy were gradually forced to recede to their own tribunals.

The French bar, as understood in modern times, traces its lineage to the ordinances of St. Louis, dated in 1270, which prescribed in some measure the duties of advocates. Three things were required of them, loyalty, courtesy, disinterestedness. It seems that it required such a quantity of words to display these three qualities that it soon became necessary to add a fourth; for, in a very few years later, brevity was also strictly enjoined; and this last quality appeared to be the most difficult of all to be attained. Before the close of the thirteenth century a magistrate gave the following charge to the bar: "Good method is needful to advocates, and to all sorts of people who have to plead for themselves, or for others; and when they set forth their pleas they should compress the facts in as few words as they can, the contention being, however, all comprised in the words; for the memory of man retains more easily a few words than many, and they are more agreeable to the judges who receive them." Time and again the courts renewed the protest against that prolixity which in early times seemed to be almost inseparable from the law, and which in a variety of forms still adheres to it. There is something even pathetic in the appeals of judges, who must have suffered much, against the prevailing redundancy of the pleadings, written and oral. Advocates were implored "to leave off all digressions in order that they might go straight to the material points, to avoid useless replies and repetitions, not to employ subterfuges and circumlocutions," which then, for the first time, began to be called chicanery.

Then, as if all patience were well nigh lost, the charge proceeded to recommend to the bar that "in speaking they should not open their mouths inordinately wide; neither should they gesticulate at random with their heads and feet; nor disfigure their faces with contortions; nor display a great pomp in small cases; in short that their voices and discourse should be in harmony with the subject on hand."

In those days the court of Parliament and

the advocates practicing in it, who were divided into consulting advocates and speaking advocates, followed the king in all his movements; and hence was brought about a graduation of fees based in some degree, curiously enough, on the style in which the advocate travelled. A writer of that age says, "Their salary is regulated by days, according to the importance of the affair, according to their learning and their estate; for it is not reasonable that an advocate who goes on horseback should receive as large wages as one who travels with two horses, or with three or more." It would appear, therefore, that a one-horse lawyer was at the lowest grade of the profession.

The fees do not seem to have been very large, and we are told that often the lawyers pleaded without pay for relatives, "or for the poor, in the name of our Lord." They were forbidden by the rules of the order to refuse their services in defence of a party who was indigent or oppressed, under penalty of expulsion from the bar. If a lawyer practised without pay, no oath of office was administered, but he could not charge any fees until he had taken an oath of office "to maintain himself in the office of advocate well and loyally, and not knowingly to sustain any but a good and loyal cause."

It must not be supposed that when a cause was to be tried by wager of battle the lawyers had nothing to do with the case; for the allegations on either side were drawn up by lawyers, so as to form a regular issue; and these allegations were read on the ground before the parties engaged in the combat. But here the place of the lawyer was quite subordinate; and as all the persons present would probably be anxious for the fight to begin, he was specially admonished, in matters of this kind, to be brief, and to see that his language was direct. It was also needful that he should speak with such prudence and discretion as to say nothing of his own motion tending to injure or insult the adverse party; for if he should do so, he ran a great risk of becoming a principal in a like contest, in which he would require the presence of some other lawyer to perform a similar service for himself; and at least one instance is recorded where an advocate, who was performing a professional duty of this sort, was called into the field, on wager of battle, for some unlucky word which he had inserted in his pleadings; though

it is said that he got off with a good scare. The odds between a lawyer, who had probably never put on a coat of mail in his life, and a knight, who had been accustomed to all military exercises from his infancy up, were obvious enough. According to the theory, indeed, this inequality was a matter of no significance, since Heaven was supposed to fight on the side of the right, and to overthrow the wicked; so that all the champion of innocence had to do was to go through the motions of a combat, in the serene confidence that his humble efforts would be rendered effectual by supernatural aid. It would seem, therefore, that the lawyer in question was a little skeptical on this point, or else that he was too modest to expect the divine interference in his behalf.

The same barons who settled their disputes by the short arbitrament of the sword, sat in judgment between parties who preferred a more peaceable solution of their controversies. Whenever they happened to be in Paris, they sat as judges if it so pleased them, in the Court of Parliament. Fancying, as ignorant men often do, that they had a great knack of deciding cases, they rarely missed a favorable opportunity of assuming a place on the bench. Their opinions are not cited, because they gave none. Their preference was to decide in favor of plaintiff or defendant, with but little discrimination as to details; but as sometimes nothing could be done without recourse to writings and figures, there were connected with the court certain learned men of the law, who acted as private advisers to the judges in matters of unusual difficulty. In the course of time these jurisconsults, as they were called, were occasionally requested to sit on the bench with the judges for the convenience of consultation and the better despatch of business; and it came to pass at last that they acquired the right to sit there, as it were by prescription, and to hold the court alone when its barons were absent, as they were for the first time during the long wars of the reign of Charles the VI. Their absence enabled the administration of justice to assume a more regular form, and the law a more settled accuracy. In the course of time the barons found themselves unable to keep up with these changes, which made the rude country barons ridiculous where they had formerly been distinguished for ease and readiness of decision; and as they were not

supposed to learn new things, they gradually withdrew from a court which they were no longer qualified to adorn. Thus, as the lawyers had managed to exclude the clergy from the bar, they at last supplanted the barons on the bench; a result which the latter accepted only with feelings of deep jealousy and resentment, yielding reluctantly to an influence which they could not exactly understand.

After the Court of Parliament of Paris was made sedentary in that city by an edict of Philip the Fair, the bar began to take on more regular functions; and it rapidly developed into its modern form, and acquired its modern attributes. From that time the more able, learned and eloquent members of the bar, entering upon a more unimpeded career, rose fast to wealth, influence and distinction; but for a long time their personal safety was extremely precarious. One of the earliest lawyers of great note who perished by violence was Jean des Mares, a humane and upright man, an accomplished jurist, an eloquent advocate. During his long life he was devoted to the crown, and was of the greatest service in managing public affairs. When he was seventy-one years of age, a mob having broken out in the city, he addressed the infuriated populace in favor of moderation and peace. It is not known how, in doing this, he gave offence to the king, but Charles VI. commanded him to be seized and tried for treason. He was not permitted to speak in his own defence, and was hurried to the scaffold with a hundred other citizens of Paris, and there closed an honorable life with the calmness of a philosopher and the fortitude of a martyr. In other instances offended nobles made away with advocates whose tongues they could not otherwise silence, by assassination, sometimes private, sometimes judicial.

We have seen that in a very early period the bar had a jargon or dialect of its own; in losing this, other strange and formidable methods of speech came in vogue. Whether the example was at first set by the clergy who practiced in the courts, whether it was through their more general influence, or for whatever other reason it may have been, the oral pleadings of an advocate resembled a sermon more than anything else, and invariably began with some text of Scripture which he deemed suitable to his case,

or pertinent to the remarks which he had to make. The formal partition of a discourse into regularly and extensively numerated divisions, which has been so often ridiculed, and which has become so odious to our modern ears, was regarded as an indispensable requisite of a forensic oration; and the greater the number of divisions, the greater apparently was deemed the discourse. One of the most urgent of the orders laid upon the bar was that they should make such divisions: "*Materiam causarum tuarum divide per membra, ut melius commendes memoria.*" Of all the recommendations to the bar, a satirical writer has said, this rule was only dominated by the first rule of all: "*Proferas solventes non solventibus;*" ("you shall prefer those who pay to those who pay not.") After citing and repeating his text of Scripture, so that the ruling idea of his discourse, the theme of all his variations, should not be lost sight of, the advocate proceeded to announce the divisions of his subject, and how these divisions were to be subdivided. What followed all this was a complete farrago of quotations from all authors, heathen and divine, thrown in apparently almost at random; the plaintiff was a Daniel, a Hyperion, or a Joseph, the defendant a Cleon, a satyr, or a son of Belial; artificial parallels between incidents in the trial and some fable of mythology were long drawn out; the text of Scripture was repeated at the beginning of every paragraph; half of the speech would be in Latin and Greek, and hardly any part of it to the purpose.

Such was the taste of the age. Looking over these dreary intellectual secretions, which seem to us to be only persuasives to suicide, we may wonder how the judges could endure to listen to such impertinent medleys; and yet in only one recorded instance did a judge manifest any impatience at the received style, and we cannot be quite certain that he was impatient then. There was a case before the court arising out of a contract to manufacture or sell a certain number of jugs. The advocate began by citing a text of Scripture to the effect that the potter has power over the clay, and may make one vessel to honor and another to dishonor. Then after stating the divisions of his subject, he began with the manufacture of earthenware vessels among the Utruscans, and dwelt at great length upon the ceramic art among the

Romans. Coming at last to a temporary pause, the president said: "Now, sir, that you have got the Romans in the jug, you can proceed with the case."

[To be continued.]

CURRENT EVENTS.

ENGLAND.

TRADE SECRETS.—In the case of *Hagg v. Darley*, decided in the Chancery Division of the English High Court of Justice on the 25th of March last, it was held that a covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable and therefore good in law, if it relates to a trade secret. In this case the purchaser of the business of certain manufacturers and sellers of well-known disinfectants, by his statement of claim alleged, that the mode by which those disinfectants were manufactured was a secret, that the vendors of the business (of whom the defendant was one) had at the time of the sale entered into a several covenant not to carry on the business of manufacturers or sellers of such disinfectants, or other articles of a similar kind within fourteen years from that date, and that the defendant had infringed this covenant.

QUEBEC.

BATONNIERS.—Mr. W. H. Kerr, Q.C., Mr. R. Alleyn, Q.C., and Mr. Robert N. Hall, Q.C., have been elected Batonniers for the Districts of Montreal, Quebec and St. Francis respectively.

UNITED STATES.

THE BANKRUPT LAW.—The Senate on the 10th inst. passed the bill to repeal the bankrupt law, amended so as to make the act go into effect on the 1st of September next. This amendment was a concession to the friends of the existing law who have gained considerable strength in the Senate. We trust the House will concur in the amendment, as a refusal to do so might imperil the success of the movement for repeal. While an immediate, unconditional repeal of the existing statute is what is demanded by the great majority of the people, there is an in-

fluent and active body who oppose such a course. The only danger to the movement for repeal is in a disagreement of the two houses, which the friends of the law will do their utmost to bring about.—*Albany Law Journal*.

AN INJUNCTION AGAINST MESMERIC INFLUENCE.—The *Boston Advertiser* says: "A bill in equity has been filed in the office of the clerk of the court at Salem, by Miss Lucretia Brown, of Ipswich, against Daniel H. Spofford, formerly of Salem, but now of New York, in which she sets forth that she is now suffering from a serious spinal disease, caused by the mesmeric influence which Spofford exerts over her, and she petitions the Supreme Judicial Court for an injunction against Spofford, to restrain him from further exerting his influence upon her. The case is a somewhat curious one, and has excited considerable interest in the community. Spofford professed to cure diseases by the laying-on of hands and mesmeric influence. It appears that he was a pupil of Mrs. M. B. Eddy, of Lynn, who claims to have acquired the art of healing all diseases by a special revelation. She agreed to impart her knowledge to Spofford for \$100 cash and ten per cent on his future accruing profits. The \$100 was paid, but the royalty has not been, and Mrs. Eddy claims that Spofford has set up in the practice of her especial system, and has interfered with her in several of her cases, to the great injury of her patients, Miss Brown's case being one of those in which Spofford has exerted a counter influence. It does not appear that Spofford was ever called professionally to Miss Brown, but that he exerted his influence from a distance, and does now from New York. The issue of the application will be watched with considerable interest."

GENERAL NOTES.

THE CHINESE IN THE U. S.—In the United States Circuit Court for the District of California, on the 29th ult., Judge Sawyer decided, in the case of a Chinaman who applied for naturalization, that a Chinaman is not a white person within the meaning of the term as used in the naturalization laws, and not entitled, to become a citizen. The case will undoubtedly be appealed to the United States Supreme Court.

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ASSIGNMENT OF LIFE INSURANCE POLICIES.

The Supreme Court of Rhode Island, in the case of *Clark v. Allen*, has had under consideration a much controverted question of life insurance law, viz., whether a life policy is transferable outright to a person who has no interest in the life insured. One Ross had insured his life for \$2000, and afterwards assigned the policy to defendant, who paid the premiums as they fell due. On Ross' death, the defendant collected the insurance, and the action was brought by Ross' representative to recover the amount collected, less the premiums paid by the defendant and the consideration paid for the assignment. The Supreme Court, following the English rule, (also found in our Code, Art. 2591) held the assignment valid and dismissed the action. The Court referred to the conflict of decisions on the question raised. In Massachusetts and Indiana, Chief Justice Durfee observed, it has been decided that a life policy is not transferable outright to a person who has no interest in the life insured. *Stevens, Adm'r, v. Warren*, 101 Mass. 564; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116. A similar decision (but in a case having peculiar circumstances) has been given by the Supreme Court of the United States. *Cammack v. Lewis*, 15 Wall. 643. The reason given is, that it is unlawful for a person to procure insurance for himself on a life in which he has no interest, and that, therefore, it is unlawful for him to take an absolute assignment of a policy upon a life in which he has no interest; for otherwise the law could always be easily circumvented by first having a person get his own life insured and then taking an assignment of the policy. And it is also argued that the gambling or wagering element is the same, and the temptation to shorten the life insured is the same in the one case as in the other.

"But, on the other hand," continued the Chief Justice, "it has been decided in England that such an assignment is valid: *Ashley v. Ashley*, 3 Sim. 149, cited without disapproval

by Chancellor Kent, in 3 Kent's Com. 369, note. The reason given is, that such an assignment is not within the prohibition of the English statute, 14 Geo. 3, cap. 48, and that the policy, being valid in its inception, is, like any other valid *chose in action*, assignable at the will of the holder, whether the assignee has an interest in the life insured or not. This view has been repeatedly affirmed in New York. *St. John v. American Mutual Life Insurance Co.*, 2 Duer, 419; also in 13 N. Y. 31, on appeal; *Valton v. National Fund Life Assurance Co.*, 20 N. Y. 32; and see *Cunningham et al. v. Smith's Adm'r*, 70 Penn. St. 450."

JUDICIAL CIRCUITS.

The amount of travel imposed upon some of the judges who preside over Federal Circuits in the United States is not generally realized. It is true that these immense distances are no longer accomplished in a coach and four, but for the most part in Pullman and Wagner cars. The tax upon the energies of the individual, however, in any case cannot be inconsiderable. Judge Dillon, addressing the Chicago Bar Association recently, at a dinner under the auspices of the Association, thus referred to the subject:—

"The trans-Mississippi Federal circuit embraces seven States, and extends in an unbroken reach of territory from the British possessions, on the north, to Louisiana and Texas, on the south; from the Mississippi, on the east, to and including the Rocky Mountains, on the west. It comprises the States of Minnesota, Iowa, Nebraska, Kansas, Missouri, Arkansas, and Colorado. In each of these States there are two terms a year, and in one of them four terms, making sixteen terms annually. With the exception of Arkansas and Colorado, I have, for the last eight years, attended twice a year the terms of courts in each of these States and in Arkansas, and in Colorado, since its admission, invariably once each year and sometimes twice. The distances actually travelled are immense,—not less than ten thousand miles a year. The distance from St. Paul, where one can almost cast a stone across the Mississippi, to Arkansas, where the stream has broadened into a mighty and majestic river, bearing the commerce of twelve States, and on whose lordly bosom hostile fleets have contended, is vast. And the

distance from the great city of St. Louis to where Denver serenely sits, sentinelled and begirt by the lofty and snow-clad peaks of the Rocky Mountains, is scarcely less.

"The dockets are crowded with causes, original and appellate, of great variety and importance,—civil and criminal, at law and in equity, in admiralty and in bankruptcy. And this is only typical of the condition of the other circuits. With so much work, and with so little time for deliberate and sedate consideration, mistakes must be numerous. But the fault lies not so much with the overworked judges as with the faulty system which imposes such vast labors upon them. The State judges generally are almost equally overburdened. Hence we inevitably have a constantly increasing mass of decisions, State and Federal, many of which must be erroneous, and which, while standing as precedents, bear pernicious fruits."

THE EARLY FRENCH BAR.

[Concluded from Page 252.]

In those days a common-place book, filled with scraps of citations from all kinds of ancient writers, on all kinds of subjects, was deemed necessary to the equipment of every advocate. Pasquier, a truly great lawyer, and an exceedingly powerful orator, was among the first to discard the sacred text at the beginning of his speeches, and to renounce the continual quotation of the olden authors. Deeply imbued with classical learning, he perceived that the proper method of imitating the classic authors was not to patch up a composition out of their disjointed sayings; that the beauty of those authors consisted in their simplicity and perspicuity, a certain ease and directness of speech by which they concealed their art, instead of parading it to public view. The innovation which he made required all of his ability to sustain it. He had a neighbor who was also a lawyer, and was devoted to the old order of things; he claimed it as a glory that he had discovered the origin of the bar in the pages of Homer, and he expressed it as his opinion that "there could be nothing more profitable than an etymological dictionary, containing the names of all the arts, and of all utensils, in Greek, Latin and French, which

would be a fountain from whence one might draw the most beautiful similitudes and comparisons which could be used, and which would be nowise common." It was thus that he expected to adorn his eloquence, by unheard-of words and phrases drawn from the dead languages, beautiful similitudes and comparisons extracted from a dictionary. Pasquier insisted with him that these citations were quite unknown to the ancients, and finally induced him for once to make a speech entirely out of his own head. Apparently he was not quite pleased with the experiment, for he afterwards told his adviser, "that that single speech had cost him more trouble than any three that he had ever pieced together by making quotations."

The habit seemed to be well-nigh incorrigible. It could hardly be expected that a discourse which was a mere medley, taken from various and indifferent sources, would have any very close relationship with the matter which happened to be under nominal discussion; if any connection existed, it was remote and precarious. Poggio, the Florentine historian, wrote a book on the question, "Whether, when a man is invited to dine with another, he should return his thanks to his host for the dinner, or whether the host should return thanks to his guest for the favor of his company." Doubtless it would occur to most persons that the solution of the question would depend almost wholly on the circumstances of each particular case; somewhat on the goodness of the dinner and the goodness of the company. But thus it was that scholasticism dealt with every question as a pure abstraction, leaving out all details as irrelevant matter.

It may seem wonderful to us that men could ever have made such orations, still more wonderful that men could ever have listened to them; but there is abundant evidence that they were greatly admired in their day; the absurdity of the method was neither seen nor suspected. Is the bar now unconsciously committed to practices which will be equally outworn in some coming time? If we could see them, possibly such may chance to exist. A man through political influence, or popular favor, or executive patronage, gets on the bench; he is one whose opinion has been rarely asked, and still more rarely relied upon; and which, perhaps, could not be acted on in

any serious matter without misgiving and trepidation; and yet as soon as he is placed on the bench, without any intellectual regeneration to convert ignorance into learning, or any mental alchemy to transmute his painful mediocrity into vast ability, he at once becomes an "authority." Could legal Lamaism go any farther? If the lawyers of whom we have been speaking quoted Christ and Ovid, St. Peter and Catullus in the same breath, do we not also cite Marshall and Busted on the same page? If they culled their quotations with an unstinted hand, do we not cite authorities to prove every legal idea which we advance; often as to points which no one ever disputed, very much as if an astronomer in saying that the sun stands on the meridian at noon-day, should prove his position by adding the names of Newton, Herschel, and many other astronomers? It must be owned that we do something in this way; and it is all very proper; but it may happen that it will look quite otherwise to our descendants three or four hundred years hence.

In an age of great ignorance and corruption we could hardly expect to find the bench and bar quite free from reproach; if such were the case with the French bench and bar in early times, they were maligned to an almost unexampled degree. Satirists did not spare them. One of them thus addresses the bar: "When you are in the court, and are pleading one against the other, it would seem as if you were ready to devour each other, as if you had an eager desire to protect innocence; but when you come out, you go to the nearest drinking house, and there devour the substance of your clients. You are like foxes, which appear to be disposed to tear each other up, but which precipitate themselves in common upon a hen-roost, there to consume their prey." Another, no less savage, speaks of them as follows: "Is it a good thing to see the wife of an advocate, who had not ten crowns of rent after buying his office, going about dressed like a princess, with gold on her head, on her neck, on her waist and other parts of her person? You say that this is suitable to your estate. To the devil with you, and your estate, too." But the most terrible apostrophe hurled at the judges, lawyers, and all others connected with the administration of justice, was as follows: "The gentlemen of the Parliament of Paris have the

most beautiful rose which there is in France, (alluding to a rose-window which adorns the Palace of Justice), but it has been stained crimson with the blood of the crying and weeping poor. These gentlemen wear long robes, and their wives are dressed as princesses. If their garments were put under a press, the blood of the poor would run out. My lords jurists, are the revenues that you spend a part of your patrimony?"

This language is severe, and betrays a bitter animosity; but beyond the invective and denunciation, it contains hardly a serious charge. It was no discredit to the bar that the heat arising from discussion in the courts was not perpetuated in lasting dissensions; nor that some of the bar were prosperous and able to dress their families well; and as for the oppression of the poor, the accusation is so vague as to be of but little force.

However ardent may have been the feelings excited by the debates which took place in the courts, the courtesies of the bar seem to have been carefully maintained. In the trial of a cause, M. Claude Mangot, in making the closing argument, was interrupted by Versoris, whose speech he was answering. Turning to his adversary, he said: "Monsieur Versoris, you do wrong to interrupt me; you have said enough already to earn your oats!" After the judgment of the court had been rendered, the president said: "Monsieur Claude Mangot, the court directs me to say that that which is given to advocates for their services is not called oats, but honoraries." The reprimand was not very severe, but Claude Mangot took it so much to heart that he became ill from it and died a few days afterwards. He must any way have been of a singular disposition, for after his return from the University, beginning the study of the law, he made a vow not to utter a single word for four years, a resolution to which he firmly adhered. During these four years he was exceedingly diligent in study, and in attendance upon the courts; and then, entering upon the duties of an advocate, he achieved a brilliant and lasting reputation. Of him it was said by another great lawyer: "He was the most accomplished person that one could desire to see. He was only thirty-six years old when he died, and he would have had no equal in probity and integrity, in learning, or in his acquaintance with

literature, if he had lived to arrive at man's estate."

Another instance of collision between two members of the bar is recorded. In 1595, Arnauld, who was then at the head of his profession, was called on to pronounce the eulogy of Montmorency before the Parliament of Paris, on the occasion of the enregistering of the commission of the latter as Constable of France. This, as all like occasions, was a place for the display of great pomp, royalty and nobility being fully represented on the seats of the court-room; the orator for the time being expected to set forth all the virtues of the recently elevated dignitary with a Ciceronian discourse, abounding with the most fastidious encomium; the person thus applauded being present, and being presumed to take great pleasure in hearing his own praises, skillfully gotten up to order; such was the taste of the age. Arnauld acquitted himself the best he could, and was warmly applauded for his eloquence; but there happened to be present a young Huguonot advocate, Du Pleix by name, who only saw the ridiculous side of this proceeding; and a few days afterwards he published an ingenious and laughable travesty of the oration, which met with still more favor than the original, whose fulsome adulation it was intended to rebuke. Arnauld had attained to great influence, fortune and fame, and having become a little dogmatic and sensitive, as old lawyers in such case sometimes are wont to be, he had Du Pleix brought before the court in secret session, to answer for this breach of propriety. On being reminded of his offence, Du Pleix, addressing the court, said, in a manly sort of way: "I have committed a folly, and it is necessary that I swallow it down. But open the doors, for it will be more exemplary for the youth, if this should be recanted in their presence," and then in a public audience he prayed Arnauld to pardon him. But, like the flying Parthian, he reserved his most envenomed and fatal shaft for the last; for on scrutinizing the records of the Chamber of Accounts he found patents to the infant children of Arnauld for annual pensions of fifteen thousand pounds, which, by virtue of legal proceedings which he instituted, he caused to be annulled.

It has been the fate of lawyers in all times to be abused by satirists who are keenly alive

to the details of life, and to be praised by historians, who sum up general results. It must be admitted that in the time and place of which we are speaking, virtue was a plant of rare growth; from the throne to the hovel, corruption, passion, cupidity, prejudice, reigned almost supreme. The church was no better than the world. Spiritual preferment was bought and sold like any other commodity; boys were made bishops; and war, gallantry, and something worse, were the most prevalent pursuits of the clergy. It was an age when dogma trampled upon and scorned the better feelings of the heart. The ministers of religion, who usurped dominion of the fagot and the sword, were often the readiest apologists for crime. The most revolting and odious of all discourses ever placed upon record, was one made by Jean Petit, a monk and a doctor of theology, on the 8th day of March, 1408, before a royal council. The Duke of Burgundy, having caused the Duke of Orleans to be foully assassinated, appeared before the council, and his cause was pleaded by Jean Petit, who, in his address, not only absolved the assassin, but demanded that he should be recompensed, exalting the practice of assassination to the rank of one of the cardinal virtues. The right to assassinate an enemy he proved by twelve reasons, so numbered in honor of the twelve apostles; three being drawn from the moral philosophers, three from theological doctrines, three from the civil law, and three from the holy writ. These premises were set forth with a wealth of falsehood and blasphemy which has never been equalled; and yet the orator was so much admired that he was compelled to repeat his oration to an immense and applauding multitude in front of the church of Notre Dame. There is, perhaps, not a nest of robbers now on the face of the earth that would tolerate the sentiments which he uttered. What, then, shall be said for the acclaiming populace?

Only one thing; and that is, that they were, perhaps, not quite so bad as they seemed, though, doubtless, they were close on the margin of total depravity. We cannot proceed far with the history and literature of that period, without perceiving that the people of that day were not the people of ours. What they admired, we admire no more; what they mourned over, we rejoice at; their jests, which set the

table in a roar, would make us shed tears, if we had tears to shed. So great is this difference that it seems to amount to more than a difference of taste. The truth is that scholasticism had totally vitiated the human mind; form had superseded substance; the object of language was neither to express nor conceal thought; not to convince the understanding, nor yet to persuade the heart; but was simply to astound and mystify the hearer by a maze of ingenious paradoxes, a train of audacious sophistries; and the speaker or the writer was admired only as an acrobat is admired, for his feats of skill, with but little regard to the utility of his efforts.

Where want of space forbids a resort to proof we must venture, as a well-grounded opinion, that in point of decorum, learning and integrity, the bar contained a greater number of creditable examples than any other rank or calling in society. Pierre Flotte, a lawyer, was excommunicated by the pope, Boniface VIII., as being "one-eyed of body, and totally blind of spirit;" (*Semi-videns corpore menteque totaliter excecatus*); but this was only for maintaining the laws against the encroachments of the Holy See. Another lawyer, Yves de Kermartin, was canonized by another pope for the good deeds done while in the flesh. He is the only lawyer, it is said, who ever attained to that posthumous honor; he is known in the calendar as St. Yves, and is the patron saint of the French bar. History transmits the names of many lawyers of this early period, who were no less beloved and respected for their integrity and virtue, than renowned for their learning and eloquence.

After the discovery, or reported discovery, of the Pandects at Amalfi, the study of the civil law was pursued with all the zeal which marked the restoration of learning; and then arose the great teachers of the law who mapped out the plan of ancient and modern legal science. Among these, and of the first, was Alciat, a Milanese by birth, but by adoption a Frenchman, who first clothed the law with the elegance of polite literature, and who prepared the way for Cujas, the only lawyer to whose name the epithet of great has ever been permanently attached. Devoting his life exclusively to the study of the Roman law, possessing a vast genius for scholarship, Cujas is

supposed to have attained a proficiency in this branch of learning which has never been equalled in modern times. His habit was to lie at full length on the floor, poring over some volume or manuscript of the law. Vast throngs of students followed him wherever he went. As he spoke of nothing but his favorite science, and never on the subject of religion, he was suspected of being a Calvinist. Being asked one day, directly, his opinion on the subject of religion, he remarked cautiously that he found nothing on the subject in the Pandects. There is no doubt but that this study of the civil law produced a class of men who, in respect of philosophic cultivation, of scientific attainment, and of liberality of character, excelled our revered sages of the common law. It was but natural that it should do so. We can not mention many names in this brief article; but let us pause, in conclusion, upon that of a good, pure and great lawyer, Chancellor l'Hopital.

There is something in the life of this man that elevates and refines our conception of human nature. It can not be unfair to compare him with a great English judge of a later period. Sir Matthew Hale was born more than a century after l'Hopital. Both were profound jurists; able, upright, laborious and conscientious judges. Both of them, in the intervals of exacting pursuits at the bar and on the bench, devoted their time to legal and miscellaneous writings. Of the latter kind, Hale left behind him two volumes of moral and religious tracts; l'Hopital two volumes of Latin poems. The former had a great success in their day; the latter are said by those who have read them to be not destitute of poetical talent; but both the homilies and poems are nearly forgotten now. Both had a capacity for unrelenting and profitable study, and both were cultivated scholars. But at this point the resemblance ceases. The earliest born was by far the more enlightened of the two. Sir Matthew Hale, a prey to bigotry in its gloomiest form, caused two women to be burned for witchcraft; he was the last of the English judges who sentenced for that offence. So rank was his intolerance, that he declared that whoever believed not in witchcraft was an atheist. Far from being a time-serving judge, yet it so happened that all his errors only tended to his

official promotion, and to an increase of popular favor. His didactic writings made his name, while he was living, a household word, and enhanced the veneration in which he was held after his death. If it is a reproach to his memory that he caused two decrepit, innocent old women, to be burned to death by fire, it was no discredit to him while living; he was mentioned in the prayers of the faithful, and his walk and conversation were pointed to as an example which the youth would do well to follow. Even now it is said that he must be judged by the age in which he lived, and that he is not to be censured for faults which were common to his time; but this claim is, perhaps, more charitable than correct, since we judge all men by their relationship with the era in which they live; not to applaud them if they have been no worse than those by whom they were surrounded, but to discern whether they have intellectually or morally excelled their age.

It is no merit now to disbelieve in witchcraft; it would have been a merit in Sir Matthew Hale. There were not wanting intelligent men and women, living at that time, who rejected the barbarous superstition; and certainly this learned judge who was familiar with the great writings of antiquity, was not without the means of forming a higher judgment. The truth is, that with all his fine natural abilities and extensive acquirements, there was a certain narrowness in his composition which greatly limited the bounds of his intellectual vision. To him the common law, with all its artificial, and often unjust and oppressive rules, was the perfection of human reason; and to him vulgar and irrational superstition spoke with the accents of the divine voice. While he was free from servility, he was at the same time a stranger to that spacious freedom of thought which made up the life of l'Hopital. Both lived in strangely troubled times, wherein the path of duty was closely beset with thorns and snares, when any sincere conviction might be branded and punished as a crime; but from out of these difficulties the French jurist achieved the nobler triumph. Sir Matthew Hale walked hand in hand with all the prejudices of his age; if he sometimes withstood the crown, he never resisted the people; l'Hopital did both. Animated by a sincere respect for religion, mindful of its precepts, and diligent in its ob-

servances, he discarded the common belief in sorcery. At a time when religious persecution was esteemed to be the first duty of a citizen, he pleaded almost alone for religious toleration. He was not only in advance of his age; he was in advance of the present age.

"Placed by circumstances near a king who was a minor, and between two hostile factions, charged with the maintenance of the royal authority against all the unchained passions and interests of the time, l'Hopital was a political as well as a forensic orator; but whether in the assemblies of the States General, or in the forum of the Parliament, he never forgot his character as a magistrate. It was not by violence but by gentleness that he sought to allay hatred and to restore peace. It was toleration that he preached, with a strong and natural eloquence, sprinkled with popular proverbs, breathing the amiable spirit of the gospel. Whilst Catholics and Huguenots were running to arms, he assailed his adversaries with the weapons of charity. 'A good life,' he said, 'persuades more than prayer; the sword can do but little against the spirit, unless it is to destroy the soul with the body. Let us take away these diabolical names, names of parties, factions and seditions, Lutherans, Huguenots, Papists; let us not change our name of Christians!'"

In another discourse he said: "Let us look upon the Protestants as our brethren; let us not condemn a helpless people unheard. What we have to do is to rule the State, not to pass on questions of faith. One may be a good citizen without being a Catholic; one may separate from the church without ceasing to be a good subject of the king. What is needed is that the citizen, whether Protestant or Catholic, live in peace. Woe to those who counsel the king to put himself at the head of half of his subjects for the purpose of butchering the other half!"

And not in vain did he labor; for after years of painful and fearless effort, he obtained the edict which prevented the establishment of the Inquisition in France, and also the more short-lived edict of pacification, guaranteeing the free exercise of Protestant worship. Certainly a man living on the border-land of the middle ages—for he was born in 1504—capable of these liberal and generous views, devoting a life-time

in endeavoring to secure their adoption, and achieving so much, may well be considered to be one of the brightest ornaments that the bar has ever produced in any country; as one of the heroes of the true knighthood of noble and magnanimous spirits, upon whose spotless lives the historian may dwell with pleasure, and the reader with profit.

If it is apparent to us that Chancellor T'Hoital was greatly in advance of the civilization of his time, his contemporaries for the most part only perceived that there was a want of harmony between him and them. With the usual discriminating logic of the world, they said that since he was in favor of toleration of Huguenots, he must needs be a Huguenot himself; a charge which was more plausible than any other that could be made, and was at the same time the most damaging. In 1568, Catherine de Medicis, the evil genius of her age, excluded him from the council; and a few days later she sent to his country seat, whither he had retired, and demanded the seals. He surrendered them without regret, saying truly that the world had become so corrupt that he could no longer influence its affairs. He had previously, in a public discourse, held at a time when the frame-work of society was completely overturned by civil war, when an imprudent word often meant death to the speaker, declared, with that unconscious intrepidity which was one of the most marked traits of his character, "Every order of society is corrupted; the people are badly instructed; they hear only of tithes and taxes, nothing of good morals; each wishes to see his own religion approved, that of all others persecuted."

It is said that in his retreat he found unexpected enjoyments. The exercise of private charity, the amusements of a country life, the reading and composition of Latin poems, in which he took great pleasure, and the conversation of a few friends, occupied the time which was not consecrated to the care and education of his children. Passing his days in this manner he wrote to a friend: "I was ignorant that rural life possessed so many charms. I have seen my hair grow white without knowing where I could find happiness. In vain nature had created me to love repose and leisure; I never should have surrendered myself to that

pleasing inclination, if Heaven, regarding me with an eye of pity, had not released me from the fetters which I should not have been able to break. If any one imagines that I thought myself happy when fortune seemed to smile upon me, and that I am unhappy now that I have lost all her brilliant advantages, he knows but little of the bottom of my heart."

Four years after his retirement, he saw in the massacre of St. Bartholomew, the dire catastrophe of that policy of violence which he had powerfully struggled against all his life. He recorded his sad commentary on the event in the lines of Statius:

"Excidat illa dies sevo, nec postera credant
Saecula...." [Lib. V.]

But his own life was imperilled; furious bigots recalled the author of the theory of toleration, which was a condemnation of their wicked deeds. Being counselled to flee for safety, he said, "By no means; I shall only go hence when, according to the pleasure of God, my hour is come." The next day he was told that a troop of armed men were approaching the house, and he was importuned to allow the doors to be closed and that his family and friends there present might fire upon them if they endeavored to enter; but being perfectly unmoved, he replied, "No; open the door; and if the small door is not wide enough for them to enter, open the large one." The men had, indeed, come to put him to death, but just before they reached the house they were overtaken by a messenger from the king, who was sent to inform them that the chancellor was not of those who were proscribed. On being told this he said coldly and without changing countenance, "I did not know that I had merited either death or pardon."—*U. M. Rose, in Southern Law Review.*

In a breach of promise suit at Barrie the other day, Mr. Justice Patterson pointed out that, in his opinion, an action for breach of promise should only be the resort of a spinster of mature age, whose chances to enter the matrimonial state had been entirely spoiled in consequence of the faithlessness of a suitor. In the case before him, the plaintiff was young and handsome, and, in all respects, a likely girl to captivate some other and more desirable member of the sterner sex. This very practical view of the case was upheld by the jury, who assessed the damages at one hundred dollars.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, May 16, 1878.

TORRANCE, J.

HART et al., v. BEARD.

Demurrage—Working Days.

Where a rate for demurrage was stipulated in the charter party, *held*, that only working days should be counted in estimating the demurrage.

The action was to recover the sum of \$731, balance remaining due by defendant on the purchase of 529 tons of coal. There was also a demand for five days' demurrage at 29.28 per day. The defendant confessed judgment for \$731, but denied the liability to demurrage.

TORRANCE, J., said that under C. S. L. C. Cap. 60, the delivery of coal should be forty chaldrons, or 120,000 lbs., per day. The 529 tons should have been delivered in ten working days, being from May 15 to May 26, inclusive. The delivery was not finished until May 31. The charter party was not binding on the defendant, as he was not a party to it; but it was a guide to determine the difficulty between the charterer and the defendant. The ship was to be discharged at the rate of 50 tons each working day, and demurrage was to be paid for a longer delay at the rate of £6 sterling per day. His Honor held that this meant working days, and Sunday, the 27th, and *Corpus Christi*, the 31st, must therefore be excluded. Defendant would have to pay for May 28, 29, and 30, at the rate named in the charter party, that being a reasonable allowance. Judgment accordingly.

A. M. Hart, for plaintiffs.

I. Wotherspoon, for defendant.

DIGEST OF U. S. DECISIONS.

The following is a digest of the principal decisions reported in recent volumes of State Reports, the selection being made from the fuller digest in the American Law Review. The volumes of State reports referred to are 53 Alabama; 2 Delaware Chancery; 81 Illinois; 55 Indiana; 44 Iowa; 45 Maryland; 35 Michigan; 22 and 23 Minnesota; 57 New Hampshire; 28 New Jersey Equity (1 Stewart, in continuation of C. E. Green); 66 New York; 77 North Carolina; 28 and 29 Ohio State; 83 Pennsylvania State; and 49 Vermont.

Action.—See *Corporation*, 2, 4; *Judge; Landlord and Tenant*, 1; *Officer; Proximate Cause; Witness*, 3.

Adjournment.—Where a judicial sale is duly advertised to take place on a certain day, which is afterwards made a legal holiday, the sale may and should be on that day adjourned to another.—*White v. Zust*, 28 N. J. Eq. 107.

Administration.—See *Executor*.

Adultery.—See *Evidence*, 7.

Advertisement.—See *Tax*, 6.

Agent.—1. An agent authorized to sell machines with warranty, made such a sale after his agency had expired, and delivered the notes received by him in payment to his successor in the agency, who had no authority to warrant, and who sent the notes to the principal without informing him by whom the sale was made. The principal brought an action on the notes. *Held*, that he ratified the sale, and was bound by the warranty.—*Eadie v. Ashbaugh*, 44 Iowa, 519.

2. Where an agent has a power of substitution, and exercises it, his death revokes the authority of the substitute.—*Lehigh Coal Co. v. Mohr*, 83 Penn. St. 228.

See *Corporation*, 2; *Judgment*, 1.

Animal.—A buffalo bull, which had been reared from a calf on a farm, and was as tame as ordinary cattle, was held not to be *feræ naturæ*; and an action was sustained by its owner against one who killed it while trespassing on his land.—*Ulery v. Jones*, 81 Ill. 403.

Application of Payments.—See *Payment*.

Assessment.—See *Tax*, 3.

Attachment.—See *Foreign Attachment*.

Attorney.—See *Judgment*, 1.

Bank.—The power of discounting promissory notes is an essential feature of a bank; otherwise, of buying promissory notes; and, therefore, in the case of a bank organized under a State statute not expressly authorizing it to buy notes, it was held that the purchase of a note by such bank was *ultra vires*.—*Farmers' Bank v. Baldwin*, 23 Minn. 198.

Bankruptcy.—See *Consideration*.

Beatterment.—See *Tax*, 3.

Bills and Notes.—See *Bank; Interest; Negotiable Instruments; Payment*.

Bill of Lading.—See *Carrier*, 2.

Bona Fide Purchaser.—Where the power of towns to subscribe for stock in railroad com-

panies, and issue bonds to pay for the same, had been judicially affirmed by the decisions of the courts, it was *held* that bonds bought *bona fide* while such decisions stood unquestioned were valid, though later decisions throw doubt on the power.—*Williams v. Duaneburgh*, 66 N. Y. 129.

See *Negotiable Instruments*.

Bond.—See *Bona Fide Purchaser*; *Surety*.

Bribery.—See *Quo Warranto*, 1.

Burglary.—See *Indictment*, 1.

By-law.—See *Municipal Corporation*, 2.

Carrier.—1. A common carrier is not bound to undertake to carry goods directed by mistake to a place which does not exist (as where goods are directed to *Alcey*, there being no such place, by mistake for *Albia*, a place on the carrier's line). But if he does undertake to carry the goods, he is liable as a carrier, if he fails to deliver them where they belong.—*O'Rourke v. Chicago, Burlington & Quincy R. R. Co.*, 44 Iowa, 526.

2. Goods were delivered to carriers under a verbal agreement not exempting the carriers from any liability. The carriers afterwards delivered to the consignor a bill of lading, by whose terms they were exempt from liability for loss by fire. The consignor received the bill without objection, and sent it to the consignee. *Held*, that this was not conclusive evidence of his assent to it, but the carriers must show his assent affirmatively.—*Gaines v. Union Transportation Co.*, 28 Ohio St. 418.

3. The mere fact that a passenger pays no fare does not of itself relieve the carrier from liability for negligence by which he is injured.—*Blair v. Erie Ry. Co.*, 66 N. Y. 313.

4. Goods were sent by rail, having been packed and secured on a car by the shipper, but so insufficiently that on the transit they broke loose from their fastenings and were damaged, without fault of the carriers. *Held*, that the carriers were not liable, though their servants knew that the goods were not properly packed before starting.—*Ross v. Troy & Boston R. R. Co.*, 49 Vt. 364.

See *Damages*, 2.

Cattle.—See *Animal*.

Charity.—1. A devise for the support, maintenance, and education of the poor of a county, excluding such as should reside within the poor-house, but to be distributed among such

as by timely assistance may be kept from being carried to the poor-house, is a good charitable use.—*State v. Griffith*, 2 Del. Ch. 392, 421.

2. Testator gave real and personal estate to the commissioners of a county, and their successors in office for ever, in trust for the benefit of the orphan poor and for other destitute persons of said county; and directed that the land devised should not be sold, but should be used as a home, and that the personalty should be invested and used for the support and education of such poor and destitute persons. *Held*, that a good charitable trust, and a sufficient trustee, were designated.—*Board of Commissioners of La Grange County v. Rogers*, 55 Ind. 297.

3. A bequest of a fund to employ a preacher of the Universalist denomination is a good charitable gift.—*Trustees of Cory Universalist Society v. Beatty*, 28 N. J. Eq. 570.

See *Tax*, 7.

Common Carrier.—See *Carrier*.

Conflict of Laws.—See *Executor*.

Consideration.—Forbearance by a creditor to institute proceedings in bankruptcy against his debtor is a lawful and sufficient consideration for a promise by a third person to pay the debt.—*Ecker v. Bohn*, 45 Md. 278.

Conspiracy.—See *Judge*.

Constitutional Law.—1. A State has no power to regulate the sale of patent-rights.—*Crittenden v. White*, 23 Minn. 24.

2. A State tax on the gross receipts of a telegraph company, most of which receipts were derived from messages sent by the company on matters pertaining to commerce, and to or from points without the State, *held*, not unconstitutional as usurping the power of Congress to regulate commerce.—*Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

See *Eminent Domain*.

Contempt.—See *Foreign Attachment*, 2.

Contract.—A county subscribed for building a railroad the sum of \$100,000, payable in instalments; certificates of stock were deliverable, by the terms of the subscription, when the whole was paid. After \$30,000 had been paid, it was adjudged that the county had no power to make such a contract; and no more was paid. *Held*, that the county was not entitled to receive certificates of stock *pro tanto*.—*Wapello County v. Burlington & Missouri R. R. Co.*, 44 Iowa, 585.

See *Agent*, 1; *Consideration*; *Damages*, 1; *Evidence*, 2; *Illegal Contract*; *Insurance*; *Interest*; *Rescission*; *Surety*; *Tax*, 1.

Contributory Negligence.—See *Negligence*, 1, 2; *Railroad*.

Conviction.—See *Judgment*, 2.

Corporation.—1. In general, the forfeiture of a corporate franchise can be taken advantage of only by the State; but where a corporation chartered to erect and maintain a bridge, with power to take tolls on the same for twenty years, brought an action to recover tolls, it was held that the defendant might show that the twenty years had expired.—*Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400.

2. A corporation is liable in an action of tort for the fraud and deceit of its agent in making a sale.—*Peebles v. Patapsco Guano Co.*, 77 N. C. 233.

3. Bringing an action to recover damages for wrongful expulsion from a corporation is a waiver of the plaintiff's right to be restored to membership by *mandamus*.—*State v. Lipa*, 28 Ohio St. 685.

4. One stockholder in a corporation cannot maintain an action at law against the directors for damages suffered by him, in common with other stockholders, by their negligence.—*Craig v. Gregg*, 83 Penn. St. 19.

See *Trust*, 1, 2, 3.

Costs.—See *Tender*, 2.

County.—See *Charity*, 2; *Contract*.

Coupon.—See *Negotiable Instruments*.

Covenant.—By the terms of a lease, wherein the parties covenanted for themselves, their heirs and executors (not naming assigns), the lessee agreed to put in certain fixtures, and the lessor to buy the same at a reasonable price. Held, that the parties' assignees were not bound.—*Hansen v. Meyer*, 81 Ill. 321.

Creditor.—See *Fraudulent Conveyance*, 1.

Criminal Law.—See *Evidence*, 1, 3, 7; *Game*; *Indictment*; *Judgment*, 2; *Larceny*; *Reprieve*.

Crops.—See *Fraudulent Conveyance*, 2.

Custom.—See *Evidence*, 2.

Damages.—1. A. undertook to sell the goods of B., to provide a room, a team, and other necessary means for carrying on the business, and to devote all his time to it; and B. agreed to furnish him with all the goods he could sell, at a price twenty-five per cent. below the retail rate. In an action by A. against B. for breach

of this agreement, held, that A. could recover only the value of his time, and not the profits he might have made from sales, if the goods had been supplied as agreed. *Howe Machine Co. v. Bryson*, 44 Iowa, 159.

2. Action for ejecting plaintiff from defendant's cars, for non-payment of the fare established by defendant's rules, plaintiff having tendered what he claimed, and what was ultimately held by the court, to be the lawful fare. Held, that defendant might introduce evidence of plaintiff's subsequent declarations, to show that he took passage in order to test the question of fares, and expecting to be ejected, and to make money out of the transaction; and that this, being shown, was a bar to his recovery of exemplary damages.—*Cincinnati, Dayton & Hamilton R. R. Co. v. Cole*, 29 Ohio St. 126.

See *Interest*; *Libel*.

Deceit.—See *Corporation*, 2.

Deed.—See *Evidence*, 6; *Mistake*.

Deposit.—See *Tax*, 1.

Devise and Legacy.—A bequest of three-quarters of the principal and interest on a bond given to the testator, held, a specific legacy, and not to be made up out of the general assets, the estate being insolvent.—*Titus v. McLanahan*, 2 Del. Ch. 200.

2. Under a gift by will of income to a man and his wife for life, each is entitled to one-half the income.—*See v. Zabriskie*, 28 N. J. Eq. 422.

3. Testator gave to each of his children a pecuniary legacy "when the youngest shall arrive at the age of twelve years," and directed that his widow and children should hold all his estate in common till that time. Held, that the legacies were vested.—*Sutton v. West*, 77 N. C. 429.

4. The rules of a benevolent society provided for the payment of a sum, on the decease of any member, to his family, as described in the rules, if not otherwise directed by him before his death. A member died, bequeathing his estate and property, real, personal, and mixed. Held, that this bequest was not an execution of his power over the fund due from the society.—*Arthur v. Odd Fellows' Beneficial Association*, 29 Ohio St. 557.

5. A testator gave his wife a legacy in lieu of dower, directed his executors to sell all his

real estate, gave certain pecuniary legacies, and the residue to A. B. and C., their heirs and assigns, to be equally divided between said A. B. and C. C. died before the testator. *Held* (1) that the legacy to him lapsed; (2), that it went to the testator's next of kin, and not to the other residuary legatees; (3), that the testator's widow was not barred from claiming a share in it by accepting the provision in lieu of dower. —*Hand v. Marcy*, 28 N. J. Eq. 59.

See *Charity*.

Divorce.—Fraud of wife, in not disclosing her pregnancy at the time of marriage, *held*, no cause of divorce. —*Long v. Long*, 77 N. C. 304.

Drunkenness.—See *Insurance (Life)*, 2.

Easement.—See *Way*.

Eminent Domain.—Land which had been taken and used, under statutory authority, for a canal, may be used, under like authority, for a road, without additional compensation to the owner. —*Malone v. Toledo*, 28 Ohio St. 643. *Shanklin v. Evansville*, 55 Ind. 240. —*Stoudinger v. Newark*, 28 N. J. Eq. 187, 446.

Equity.—See *Injunction*.

Eviction.—See *Landlord and Tenant*, 2.

Evidence.—1. Indictment for murder. To prove that the offence was murder in the first degree, the prosecution undertook to show that it was committed in attempting to commit rape. *Held*, that evidence that the prisoner had previously committed rape on another person was incompetent. —*State v. Lapage*, 57 N. H. 245.

2. Plaintiff employed defendants as stock-jobbers, and agreed that all transactions should be subject to the usages of their office. They bought stock for his account, and, on his failing to deposit the required "margin," sold it, without notice to him, at a loss; whereupon he sued them in trover. *Held*, that they might show that they acted according to the usages of their office. And a new trial was granted because such evidence had been excluded; but *quære* its weight or conclusiveness if admitted. —*Baker v. Drake*, 66 N. Y. 518.

3. On an indictment for murder, the prisoner contended that the killing was in self-defence. There was evidence that the deceased had followed the prisoner into a house which he had threatened to kill him if he visited, of which threats the prisoner had notice. *Held*, that evidence of other like threats, of which

the prisoner was not informed, was admissible to corroborate the former evidence, and to show *quo animo* the deceased entered the house. *Held*, also, that evidence of the violent and dangerous character of the deceased was admissible. —*State v. Turpin*, 77 N. C. 473.

4. The impeachment of the credit of a witness, by showing that he has made statements at other times contradictory to his testimony at the trial, does not lay a foundation for sustaining him by proof of his reputation for truth. —*Webb v. The State*, 29 Ohio St. 351.

5. In ejectment, the plaintiff claimed title under J. S., and offered in evidence a deed from J. S. to Rufus V., and a deed from Russell V. to the plaintiff's grantor. *Held*, that he could not show by parol that Russell and Rufus were the same person, and that the latter name was written in the deed by mistake [there being no evidence that Russell was otherwise known as Rufus]. —*Pitts v. Brown*, 49 Vt. 86.

6. A lease was made of "the premises on the corner of A and B streets, recently occupied by J. S. The shops are not included." *Held*, that the lease did not necessarily pass the whole building on the corner, except the shops; and that whether a particular part passed as having been occupied by J. S. was a question for the jury, on which parol evidence was admissible. —*Alger v. Kennedy*, 49 Vt. 109.

7. On the trial of an indictment for adultery, the husband of the *particeps criminis* is a competent witness to prove circumstances which do not directly criminate, but tend to criminate, her. —*State v. Bridgman*, 49 Vt. 202.

8. In an action to recover personal property on the ground that defendant bought it of plaintiff, not intending to pay for it, evidence that defendant was engaged about the same time in like fraudulent transactions is admissible on the question of intent. —*Eastman v. Prentiss*, 49 Vt. 355.

* See *Carrier*, 2; *Damages*, 2; *Presumption*; *Tax*, 4; *Trial*, 2; *Witness*.

Executor and Administrator.—1. The purchase by an executor of the interest of a particular legatee is no fraud on the residuary legatees, and they cannot hold him to account for the profits he may make by such purchase. —*Hale v. Aaron*, 77 N. C. 371.

2. A resident of Vermont made a promissory note. The payee lived and died in Massachusetts, and administration was there granted on his estate. *Held*, that the administrator might sue on the note in Vermont without taking out administration there; because, as the debt was due and payable in Massachusetts, it could not be assets in Vermont, and therefore there was no ground for granting administration in that State.—*Purple v. Whithed*, 49 Vt. 187.

Exemplary Damages.—See *Damages*, 2.

Expert.—See *Witness*, 1.

Feræ Naturæ. See *Animal*.

Ferry.—See *Injunction*, 2.

Fire.—See *Proximate Cause*.

Fire Insurance.—See *Insurance (Fire)*.

Fixture.—1. Platform scales on a farm, fastened to sills laid on a brick wall set in the ground, *held*, to pass by a mortgage of the farm.—*Arnold v. Crowder*, 81 Ill. 56.

2. As between a mortgagee and an execution creditor, rolling-stock of a railroad company mortgaged with the road is part of the realty.—*Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Eq. 277.

See *Covenant*.

Forbearance.—See *Consideration*.

Foreign Attachment.—1. A railroad company mortgaged its property and income to secure payment of its bonds; and, by the terms of the mortgage, remained in possession until default. *Held*, that its earnings, while so in possession, might be reached by process of foreign attachment in a suit against it.—*Mississippi Valley & Western Ry. Co., v. United States Express Co.*, 81 Ill. 534.

2. But where a receiver is in possession of a railroad, a creditor of the railroad company cannot attach its earnings in the hands of one of its debtors; and if he does so, without leave of the court by which the receiver is appointed, he is guilty of a contempt.—*Richards v. The People*, 81 Ill. 551.

3. Money taken by an officer from the person of a prisoner arrested for crime, is attachable in the officer's hands in a civil action against the prisoner.—*Reifmyder v. Lee*, 44 Iowa, 101.

Fraud.—See *Corporation*, 2; *Divorce*; *Evidence*, 8; *Executor*, 2.

Fraudulent Conveyance.—1. The plaintiff in an action of tort is not, before judgment, a

creditor of the defendant, and cannot impeach a conveyance by the latter as made to delay or defraud him.—*Hill v. Bowman*, 35 Mich. 191.

2. A. conveyed to B. land on which a crop was growing; the crop was afterwards taken on execution against A., and B. replevied it. *Held*, that the defendant in the action of replevin might show that the conveyance to B. was made to defraud A.'s creditors.—*Pierce v. Hill*, 35 Mich. 194.

See *Executor*, 3.

Game.—Where a statute forbids the catching of rabbits with ferrets by any person, except on premises owned by him, one who so hunts on premises not owned by him is not protected by having the owner's license, if he does not act as the owner's agent.—*Hart v. The State*, 29 Ohio St. 666.

Garnishment.—See *Foreign Attachment*.

Homicide.—See *Evidence*, 1, 3.

Husband and Wife.—A trustee for his wife and others, having converted to his own use part of the trust fund, was removed. *Held*, that this was not a reduction to possession of the wife's share; and, therefore, that her share of other money received by the succeeding trustee was not liable to make up the loss of the other *cestuis que trust*.—*Jones v. Randel*, 2 Del. Ch. 627.

See *Devise*, 2; *Divorce*; *Evidence*, 7; *Will*.

[To be continued.]

GENERAL NOTES.

The following anecdote is told of Sir John Holker, the English Attorney General:—As Sir John was entering the House recently, he saw a stranger standing in the corridor, inquiring after a member. The member in question happened to be a friend of Sir John's, and desirous of obliging him, he said to the stranger, "Come along, I'll get you in." The stranger followed, and Sir John passed him into the speaker's gallery. As he turned to go away, the man held out his hand, and before the Attorney-General quite realized his position, he found he was the possessor of sixpence. Sir John was very proud of the coin, and showed it to his colleagues on the Treasury Bench, affirming that it was the most easily earned sixpence he possessed.

The Legal News.

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WOMEN IN THE COURTS.

The Judiciary Committee of the U. S. Senate hold the view that women are admissible to practice as barristers in the United States Courts. A Bill went before the Committee recently, providing that women who have been members of the bar for three years in any State or territory, shall be admitted to practice in the Supreme Court of the United States, and that no person shall be excluded from practising as attorney or counsellor before any Court of the United States, on account of sex. Holding the view that there is now no law excluding females from the bar in the courts mentioned, the Senate saw no necessity for the passage of the Bill, and accordingly reported adversely to it.

The friends of the measure regard this action of the Senate as an evasion of the issue, because, in point of fact, the Courts do not admit women to practice, and the U. S. Supreme Court has refused to entertain any application for admission in behalf of a woman. She is in the same position, therefore, as if expressly excluded by the law. It is generally conceded that if all restrictions were removed, not a dozen women in the Union would avail themselves of the liberty granted. The easiest solution of the difficulty would probably be to grant the privilege requested, and the anxiety to appear in the Courts would then fade away.

A QUESTION OF DAMAGES.

In the State of Nebraska a singular enactment is to be found on the Statute book, by which the owner of live stock is allowed "double the value of his property injured, killed or destroyed" on a railroad track, in case the value be not paid within thirty days after demand on the company therefor. A case came before the Supreme Court of the State lately, in which a demand was made upon a railroad company under the above Statute, but the Court held that the enactment was repugnant to the Constitution. The excess beyond

the value of the property, the Court held, could not be regarded in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment. The penalty or fine in the present case was given by the Statute to the party claiming damages for the accidental loss of his property. But there is a provision of the Constitution which declares that "all fines and penalties shall be appropriated exclusively to the use and support of common schools."

For this, among other reasons, the Court pronounced the law unconstitutional. It would, indeed, be hard to find any reasonable ground for so extraordinary a piece of legislation. One would be disposed to conjecture that it was framed by a legislature largely bucolic, and that the authors of the provision had in view a profitable means of disposing of old or useless cattle. The slaughter which railroads would make under such circumstances would in all probability be prodigious, and a twelve foot fence on either side of the track would be insufficient to prevent it. A Brooklyn clergyman, a Sunday or two ago, denounced from the pulpit the administration of justice as tending to weigh heavily upon the poor, while the rich criminal generally managed to escape unpunished. The Nebraska enactment referred to seems to err in the opposite direction, for it fleeces companies for the benefit of cattle owners;—unless, indeed, the former be considered the poorer of the two, as holders of unprofitable shares and bonds too often find themselves at the present day.

THE LATE JUDGE DORION.

By the death of Mr. Justice V. P. W. Dorion, which occurred somewhat suddenly on Sunday last, the Bench of the Province of Quebec has lost an able and efficient member. The deceased, who was a brother of Sir A. A. Dorion, the present Chief Justice of the Court of Queen's Bench, was born at Ste. Anne de la Perade on the 2nd October, 1827, and was consequently only in his fifty-first year. He came to Montreal about the age of fifteen, was admitted to the practice of the legal profession in due course, and, in partnership with his distinguished brother, the present Chief Justice, enjoyed for many years a very extensive and

important practice. In 1875 he was raised to the Bench of the Superior Court, and was at first appointed to the Quebec District, but on the death of Judge Mondelet he was transferred to Montreal, where the same vigor, decision, and talent which had marked his career at the bar, distinguished his too brief administration of judicial office. The bar of Montreal, on Wednesday, unanimously adopted a resolution expressing their appreciation of "the ability, integrity, learning, and invariable affability" with which the deceased discharged his duties, and these words aptly describe the estimable qualities of the learned Judge.

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, May 31, 1878.

MACKAY, DUNKIN, RAINVILLE, JJ.

MACKAY v. ROUTH *et al.*, and BANK OF MONTREAL, T. S.

[From S. C. Montreal.

Concurrent Garnishment.

This was an inscription in Review from the judgment reported ante, page 161.

MACKAY, J. A seizure of moneys being made in the hands of the Bank of Montreal, the defendants contested it, because there was a previous *saisie-arrest* in their hands against plaintiff at the suit of Duncan Macdonald. This was demurred to, and the Judge *a quo* had found the demurrer well-founded. The Court here could not but confirm the judgment, as the *saisie-arrest* referred to was not disposed of, and there was nothing to show that anything would ever come from that proceeding of Macdonald.

Judgment confirmed.

Abbott & Co., for plaintiff.

Loranger & Co., for defendants.

SUPERIOR COURT.

Montreal, May 31, 1878.

JOHNSON, J.

LEFUNTUN v. BOLDUC *et al.*

Malicious Prosecution—Whence Malice and want of Probable Cause may be inferred.

Malice and want of reasonable and probable cause may be inferred from the acts, conduct and expressions of the party prosecuting, as for example, the existence of a collateral motive, such as a resolution on his part to stop the plaintiff's mouth.

JOHNSON, J. The plaintiff brings an action for damages against the defendants for malicious prosecution under the following circumstances:—He possessed a property in the Township of Milton, and had given an obligation to Bolduc for \$400, on which Bolduc sued him, and got judgment by default. The present plaintiff made a *requête civile* to get that judgment set aside, and was unsuccessful, and Bolduc brought the land to sale, and became the purchaser for \$55. The plaintiff then presented a petition *en nullité de décret*, which is still pending. The foundation of the *requête civile* was alleged want of service; and it is the affidavit which the plaintiff made in support of the *requête* that was said to be false, and upon which the three present defendants, Bolduc, François Thibault, the bailiff who made the return of service, and Charles Thibault, the attorney for Bolduc in that action, caused him to be arrested for perjury. When the case came before the magistrate, the prisoner—the present plaintiff—who was brought before him to be committed for the offence of perjury, was discharged for want of proof of his identity with the person who had made the affidavit. The action as against the attorney has been discontinued, and the two other defendants have pleaded, Bolduc admitting the arrest at his instance, and the bailiff saying that he gave evidence by compulsion, but both denying any malice or want of probable cause,—and also denying that the plaintiff had suffered any damage. They also plead that the *requête civile* was dismissed after consultation and evidence.

The only points now before me are the malice and want of probable cause for arresting this unfortunate man on a charge of perjury. They are both essentials of the plaintiff's action, and certainly the contestation on the *requête civile* and between the same persons, at least as far as Bolduc and the plaintiff are concerned, must be taken as decisive of the question whether there had been a legal service or not. But it is also undeniable that there may have been a legal service, and the plaintiff may nevertheless have been in good faith in swearing there was not, and may not therefore have committed perjury. That, however, does not touch the real point in the case, which is whether these two defendants acted maliciously, and not *bona fide*, in bringing the charge of perjury. The

dismissal by the magistrate on a question of identity would not amount to much; and under any circumstances the action of a magistrate or of a grand jury would only be a presumption that the charge was unfounded; not that it was brought through malice. There are, however, other circumstances to be considered in this case. I am strongly of opinion that, though the judgment on the *requête civile* shows that there was evidence of a legal service, the plaintiff has been perfectly honest in setting up that there was not, and in swearing to the fact. It is a very suspicious circumstance as to the time at which this accusation was brought, that the petition *en nullité de décret* had been filed, after Bolduc had got this property for \$55, and I find in a work published last year, and highly spoken of in the reviews, "Patterson on the Liberty of the Subject," something that bears very closely on this subject. Whether the charge of perjury, or the facts on which it rested, were true or honestly believed to be true is a question of fact no doubt; but whether assuming them to be true, they ought to have reasonably induced the defendants to prosecute, in other words, whether they amounted to reasonable or probable cause, is a question of law for the judge. This is an old settled rule, and the leading cases establishing it are found in all treatises on this subject. They will be found too, at page 202, of the second volume of the book I have just mentioned, but as this was never doubted, I do not now particularly refer to those cases. What I wanted to refer to especially was at page 201 of the same volume: "Though malice may be inferred from want of reasonable and probable cause, the latter cannot be inferred from malice. Both are to be inferred from the acts, conduct and expressions of the defendant, as for example, the existence of a collateral motive in the defendant, such as a resolution to stop the plaintiff's mouth." Here I am persuaded there was a resolution to stop the plaintiff's mouth, or at all events, to stop his proceeding *en nullité de décret*, by this man Bolduc, who got his property for a mere song. I do not cite this book as authority on anything new, nor even as authority at all, but as reasonable observation on existing law, which in this instance and others is expressly given in a note. I find, too, on the same page, another apposite observation: "It may be

inferred from the fact that the prosecution was instituted for a collateral purpose, such as for frightening others, or enforcing payment of a debt." I cannot shut my eyes to the fact that Mr. Charles Thibault in his deposition admits that the plaintiff may not have understood that the bailiff served an action on him, and it appears certain that Mr. Charles Thibault had possession of the copy said to have been served; and though he is not a defendant now, I cannot disconnect him from the others as far as his acts affect them. The circumstances of the arrest, and remands, and expenses the plaintiff was put to must be taken into consideration, and I feel obliged to give him damages which I fix at \$50, and costs of action brought. This man is proved to bear a most excellent character, and he has been treated, to say the least, with great harshness. I am persuaded from the facts of the case that his affidavit was true as far as his knowledge went, and there was no perjury, though technically no doubt the judgment on the *requête* held rightly that the service was sufficient.

Duhamel & Co. for plaintiff.

Thibault & Co. for defendant.

KENAHAN V. GERIKEN.

Malicious Prosecution—Conviction.

Malice and want of probable cause are conclusively disproved by the conviction of the plaintiff.

JOHNSON, J. This is an action for a malicious prosecution and arrest; and I may say at once, that considering the way in which the plaintiff has been treated by the law, and by those who are to some extent the ministers of the law, I regret very much being obliged to dismiss it. The plaintiff was a carter and was stationed in front of the St. Lawrence Hall by his comrades under circumstances that the defendant must have known very well; yet he thought proper, as he had strictly a right to do, no doubt, to prosecute him for loitering there as a vagrant, and he was convicted. The point of the case is very shortly come at. Is there such a thing as the possibility of proof of want of reasonable and probable cause, and of malice in the face of a conviction. I thought not at the trial, and I think so still. It was urged that in a case of *Forte v. The City of Montreal*, confirmed in Review two or three terms ago, the judges had held that in such a case they could incidentally

go into the question of the propriety of the conviction. It certainly was a peculiar case, and I have looked at it closely. A policeman had been called to his assistance by a person who was assaulted, and the officer, not showing much alacrity, was reproached by the person who had called him, and thereupon took upon himself to arrest him and take him to the station, and the next day the Corporation adopted the act of their officer, and had the plaintiff convicted of resisting the police upon the officer's testimony; whereupon the plaintiff in that case turned round and prosecuted the policeman before the Police Magistrate for an assault, and had him convicted and punished. He then brought an action of damages against the city, and the city pleaded that they were not bound by the act of their officer; but the Court held that they were bound, having adopted his act. That was all that was decided there, and that was all that the Corporation pleaded to the action; not a word about a conviction is in the plea in that case, nor in the judgment in first instance, which was simply confirmed in review as it stood, and even if the two cross convictions could both have been looked at, there was the conviction of the policeman for an assault, which showed he had no probable cause for arresting the plaintiff in that case. The case cannot therefore be cited as deciding that proof of want of probable cause is not decisively rebutted by a conviction, but rather the other way. In the work I cited just now in another case, where all the rules governing these cases are carefully collected, together with the adjudged cases on which their authority rests, I find the rule I laid down at the trial has always been considered as of the most necessary and decisive authority. Where a conviction is unreversed, it is conclusive evidence of the facts. See *Fawcett v. Fowles*, 7 B. & C. 394. Again: "Malice and want of probable cause, however, are conclusively disproved by the conviction of the plaintiff." *Mellor v. Baddley*, 2 Cr. & M. 875. If it could be otherwise, how could I possibly judge of the fairness of a conviction on which I have not one word before me of the evidence given for or against it? No; I must hold to the rule which I have never seen departed from—and I do so with regret under the circumstances, because the plaintiff had a permission of the Chief of Police to stand there as he

did; and although I must hold that the conviction was right, and the complainant there was right, so far as the law goes; and though the Chief of Police could not override the law more than the committee men who told him to do so, there certainly was hardship in the treatment the plaintiff got under the circumstances, at the instance of the defendant, who must have known all about it. I therefore dismiss the action, but without costs.

Keller & Co., for defendant.

Duhamel & Co., for plaintiff.

TORRANCE, J.

RHODES V. BLACK.

Contract—Illegal Consideration.

TORRANCE, J. This was an action of a peculiar character, arising out of an agreement between plaintiff and defendant. The plaintiff was a rich brewer in Pennsylvania, and defendant was in his employ as driver, and was known to be a person of intemperate habits. The latter was suddenly reported to be left heir of an estate in Australia. He entered into an agreement with his employer that the latter should supply him with \$10 a week, and also disburse the money necessary to obtain information, for which he was to be indemnified, and to receive one-half of the estate. The amount realized was over \$14,000. Plaintiff had disbursed \$1,783, and when the moneys of the estate were lodged in the Bank of B.N.A., plaintiff took out the present action to recover his share under the agreement. Defendant pleaded that he was not on equal terms with regard to the agreement, the plaintiff being his superior, and he, defendant, being a man of intemperate habits. The Court was of opinion that the consideration of the agreement was not a lawful one, and plaintiff would only get judgment for \$1,783.18, the amount which he had disbursed.

Abbott & Co., for plaintiff.

Kerr & Co., for defendant.

DORION V. POSITIVE LIFE ASSURANCE CO.

Insurance—Payment of Premium.

The question was whether the amount of insurance claimed on the life of deceased, was forfeited by the non-payment of the premium. The Company, after 1st May, ceased to do business in Lower Canada, and to have an agent there to whom payments could be made. The

plaintiff urged that it was not his duty to go to England, where the head-quarters were, to pay the amount.

TORRANCE, J., said that under the circumstances, the contention of the plaintiff should be maintained, and judgment must go against defendants.

Geoffrion & Co. for plaintiff.

Bethune & Bethune for defendants.

EVIDENCE OF ACCOMPLICES.

It has been observed in many of the celebrated criminal trials that have taken place in this country during the last few years, that the testimony of an accomplice has played an important part, and some of the most hardened criminals charged with high crimes could not have been convicted but for such testimony. But we cannot say that all convictions by the aid of such testimony are just, or that by its assistance the innocent may not *sometimes* suffer. Yet it is thought the stern necessities of good government demand the policy in the administration of Criminal Law, for without such testimony it is sometimes impossible to detect many crimes the most detrimental to society, and therefore the evidence of accomplices has at all times been admitted either from a principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases; but it has been well observed that in a regular system of administrative justice they are liable to great objections. "The law," says one of the ablest and most useful modern writers (Chitty) upon criminal jurisprudence, "confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery and destroys the last virtue which clings to the degraded transgressor. On the other hand it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." *People v. Whipple*, 9 Cowen, 709.

Who are accomplices: The definition of the term "accomplice" in legal phraseology has not been the same in different cases.

In *Lindsay v. People*, 63 N. Y. 143, an accomplice is defined "as one of many equally concerned, or a co-partner in the commission

of a crime. The term includes all the *participes criminis* whether considered in strict legal phraseology as principals or accessories." Bishop gives the following definition: "A person to be technically an accomplice must, it appears, sustain a relation to the criminal act that he could be indicted jointly with the others for the offense. 1 Bishop on Cr. Pro., § 1084; *Drum v. People*, 29 N. Y. 523-527. To constitute an accomplice, the person charged as such must have an intention of committing the crime, mere apparent concurrence is not enough. *United States v. Henry*, 4 Wash. C. C. Rep. 428. One who purchases intoxicating liquor sold contrary to law, for the purpose of prosecuting the seller for an unlawful sale, is not an accomplice. *Commonwealth v. Downing*, 4 Gray, 29. A detective who acts without any felonious intent but solely with the view of discovering the perpetrators of the crime is not an accomplice. *State v. McKean*, 36 Iowa, 343. So likewise a person who has no knowledge of a larceny until after its commission, and who buys the stolen goods by direction of an officer with funds supplied by an officer in order to detect the thief, is not an accomplice whose testimony needs corroboration. *People v. Barrie*, 49 Cal. 342.

In Alabama a partner of one of the players in his winnings or losses in the game in which the defendant played, and who advanced money to the defendant, which was used by him in betting on the game, is an accomplice within the Statute (Code, § 3800) which forbids a conviction on the uncorroborated testimony of an accomplice. *English v. State*, 35 Ala. 428.

A bystander does not become an accomplice by mere approval of a murder committed in his presence, and the charging of the jury that if the defendant was "present aiding, or abetting, or counselling, or inciting, or encouraging, or approving" the act, he was an accomplice, is an error, and the court must reverse and order a new trial. *State v. Cox*, 65 Mo. It is for the jury to determine whether or not a witness jointly indicted with the defendant is an accomplice. *State v. Schlager*, 19 Iowa, 169.

The practice now adopted in England is for the magistrate before whom the accomplice is examined, or the court before which the trial is had, to direct that he shall be examined, upon

an understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. Roscoe's Cr. Ev. 124. In Scotland the course pursued with regard to an accomplice who has been admitted against his confederate, differs from that adopted by the English law, and seems better calculated to further the ends of justice. There by the very act of calling the accomplice and putting him on the witness stand, the prosecutor debars himself from all right to molest him for the future with relation to the offence charged.

"This privilege is absolute and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is on the witness stand; but it would be much more put in hazard if the witness was sensible that his future safety depended on the extent to which he spoke out against his associates at the bar." Alison's Prac. Cr. Law of Scot. 453. But in the United States an accomplice, by turning informer and testifying for the prosecution, acts under the implied condition that he earns an exemption from punishment by declaring the whole truth; but how are we always to know he tells the truth, especially when it is not an absolute requirement that he must be corroborated?

If testifying to an untruth would, in the opinion of the accomplice, be more likely to bring him exemption from punishment—which is generally the question of greatest importance with persons of such character—would it not be a most powerful incentive for him to do so? But is he not more likely to tell the truth than otherwise, even though he is conscious there is no evidence to corroborate him? These are speculative questions, but under the caution exercised by a prudent court, in its instructions to the jury, no great harm need be feared. Still, we believe that if, after having made his confession to the prosecuting attorney, he should be sworn on behalf of the prosecution, with the full understanding that in any event he could never be punished for the offence charged, it would be much the safer rule.

In England the court usually considers not only whether the prisoners can be convicted *without* the evidence of the accomplice, but

also whether they can be convicted *with* his evidence. If therefore there be sufficient evidence to convict without his testimony the court will refuse to allow him to be admitted as a witness. Roscoe's Cr. Ev. 120. Accomplices may in all cases by permission of the court be used by the government as witnesses in bringing their associates to punishment. *Lindsay v. People*, 63 N. Y. 143. And although it is in the discretion of the court to admit or refuse, yet in practice this matter is left almost entirely to the discretion of the prosecuting attorney. This at least is the practice in the State of New York, and the court is not likely to interfere except in a case where under *all the surrounding circumstances* it seems to be necessary, as in the case of *People v. Whipple*, 9 Cowen, 708 (1827). In that case the district attorney moved the court that Jesse Strang, who had just been convicted by the verdict of a jury, as a principal, in the murder of which Mrs. Whipple stood charged as accessory before the fact, should be brought up and examined as a witness on the part of the prosecution. This was objected to by the prisoner's counsel, and the court, in a very elaborate opinion discussing the circumstances fully, denied the motion. The main ground for the denial of the motion seems to have been that Strang was the greater criminal of the two, even conceding Mrs. Whipple to be guilty of the charge brought against her, and that by allowing him to testify there would be an implied condition of recommendation of pardon if he told the truth. The court propounded the following significant question: "Why then should we select her for punishment in preference to him?" So in a later case where it was sought to make an accomplice a witness for the government upon an implied promise of pardon, the court held "that it rested upon judicial discretion and is not at the pleasure of the public prosecutor. An accomplice under an indictment for another offence, as a general rule, will not be admitted as a witness when such fact is known to the court, although he testify in good faith against his accomplice on the trial upon one indictment, he may be tried upon the other, and upon conviction punished. It would be a fraud upon the court and an obstruction of public justice if the public prosecutor should enter into an agreement unsanctioned by the court (if such

sanction could be given in such a case) offering immunity or clemency to several defendants in several indictments upon the condition that one of them became a witness for the prosecution upon still other indictments. *Wright v. Rindschopf*, 13 Wis.

The court would also undoubtedly interfere by refusing to try a prisoner who had testified as State's evidence against another if it should appear that the prosecuting officer was pursuing him in violation of the express or implied understanding. *Bishop's Cr. Pro.* § 1076, note.

"There is no practice in this State requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the State." 63 N. Y. 143; 12 Hun, 215. It is not to be understood, however, that in all conceivable situations of an accomplice before the courts that it is in the discretion of the court to allow him to testify for the People. The true rule as to competency seems to be, When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the People may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court; but they cannot be called as witnesses for each other though separately tried, while the indictment is pending against them. If acquitted they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sent once must have followed the conviction. When all are tried together if the People desire to swear an accomplice, he must in some way be first discharged from the record. *Wixon v. The People*, 5 Park. Cr. 126; *Taylor v. People*, 12 Hun, 213-214.

When the accomplice is indicted separately from the rest he is of course a competent witness for the prosecution, though no disposition has been made against him.

In fact, with reference to his competency, an accomplice jointly indicted and separately tried is in the same condition as one separately indicted or one not indicted at all. 1 Bish. on Cr. Pro. §§ 1079, 1080. One of several persons indicted, although he have pleaded and defended separately, is not a competent witness for his co-defendants unless immediately acquitted by

a jury, or a *nolle prosequi* entered, or convicted and sentenced for an offence which would not disqualify. *McIntyre v. People*, 9 N. Y. 39.

If a witness who has become State's evidence testifies corruptly, or makes only partial disclosures, he may then, having failed to perform the condition on which he was admitted, be proceeded against for his own crime; but he is not thus liable simply because of a failure by the jury to convict his associates. "It resta," said Lord Mansfield, "on usage, and on the offender's own good behaviour, whether he shall be prosecuted or not." And where an accomplice, after making a confession on the usual understanding, refuses to testify, this confession may be given in evidence against him on his trial. *Commonwealth v. Knapp*, 10 Pick. 477.

As the accomplice is entitled to no protection in respect to other offences, he is not bound to answer questions relative to such offences on his cross-examination. It is not usual to admit accomplices who are charged with other felonies. In the earlier State trials of England, the protection and countenance afforded by the courts to accomplices, spies and informers, was often carried to great lengths; but in modern times a closer scrutiny of the evidence from such a source is required, and more safeguards for the protection of the innocent established, so that the conviction of a prisoner by the aid of an accomplice at the present time, upon such weak and insufficient evidence as brought Algeron Sidney to the block, is almost an impossibility.—*Albany Law Journal*.

DIGEST OF U. S. DECISIONS.

(Continued from p. 264).

Illegal Contract.—Members of a public-school board, in their individual capacity, ordered apparatus for the schools, and agreed to call a meeting of the board and ratify the contract. Held, that the contract was against public policy, and would not support an action.—*McCortle v. Bates*, 29 Ohio St. 419.

See *Tax*, 1.

Indictment.—1. Indictment for burglary in a house "belonging to the estate of the late J. S." Held, bad; overruling former decisions.—*Beall v. The State*, 53 Ala. 460.

2. An indictment describing the prisoner's Christian name by initials only, is abateable by

plea setting out his name in full, with an averment that the same was known to the grand jury.—*Gerrish v. The State*, 53 Ala. 476.

3. An indictment for administering a poisonous substance (strychnia) with intent to kill, must aver that the defendant well knew the said substance to be a deadly poison.—*State v. Yarborough*, 77 N. C. 524.

Indorser.—See *Payment*.

Infant.—An infant cannot be a justice of the peace.—*Ex parte Golding*, 57 N. H. 146.

Injunction.—1. A tax-payer of a county may maintain a bill to restrain the county commissioners from publishing, at the expense of the county, the list of delinquent taxes in a newspaper other than that authorized by law for such purpose.—*Sinclair v. Commissioners of Winona County*, 23 Minn. 404.

2. The owner of a ferry franchise may have an injunction to restrain other persons from running, without license from the State, another ferry which takes away passengers from his.—*Midland Terminal & Ferry Co. v. Wilson*, 28 N. J. Eq. 537.

Insurance (Fire).—1. A policy required notice to be given to the insurers of any mortgage made on the property. *Held*, that the assured must give actual notice, at his peril; and that a notice sent by mail to the insurers, postage paid, but never received by them, was not sufficient.—*Plath v. Minnesota Farmers' Insurance Association*, 23 Minn. 479.

2. A policy provided that in case of loss the insurers might rebuild, on giving notice of their election so to do within thirty days. *Held*, that although they had not given notice within that time, they might afterwards rebuild, instead of paying the loss, if the assured consented, and notwithstanding his creditors objected.—*Stamps v. Commercial Ins. Co.*, 77 N. C. 209.

See *Railroad; Vendor and Purchaser*.

Insurance (Life).—1. A policy of life insurance was conditioned to be void on default of payment of any assessment within thirty days from date of notice thereof. *Held* (1), that the time was to be reckoned from and exclusive of the day on which the assured received the notice; (2), that by his death within that time the insurer's liability was fixed, and was not avoided though the assessment was not paid

within the time.—*Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

2. A life insurance policy was conditioned to be void if death should happen while the assured was, or in consequence of his having been, under the influence of intoxicating drink. *Held*, that if the assured was drunk when he died, the policy was avoided; and that it was immaterial whether or not the drunkenness was the cause, proximate or remote, of the death.—*Shador v. Railway Passenger Assurance Co.*, 66 N. Y. 441.

Intent.—See *Evidence*, 8.

Interest.—A promissory note bearing interest at less than the legal rate will carry interest at the legal rate, as damages, after maturity.—*Moreland v. Lawrence*, 23 Minn. 84.

Judge.—A judge is liable for conspiring to institute a malicious prosecution in his own court.—*Stewart v. Cooley*, 23 Minn. 347.

See *Infant; Search-warrant*.

Judgment.—1. A joint warrant of attorney to confess judgment is not revoked by the death of one of the debtors; but judgment may be entered on it against the survivors.—*Croasdell v. Tallant*, 83 Penn. St. 193.

2. A joint conviction of two is a several conviction of each; and if one of the two is afterwards convicted of a like offence, he may properly be sentenced as for a second offence.—*State v. Brown*, 49 Vt. 437.

Judicial Sale.—See *Adjournment*.

Jury.—See *Trial*, 1.

Justice of the Peace.—See *Infant*.

Landlord and Tenant.—1. A landlord having a lien for rent on the crop grown by his tenant may maintain an action against a stranger who removes the crop, with notice of the lien, although without any intent to defraud him of the benefit of it.—*Hussey v. Peebles*, 53 Ala. 432.

2. The owner of a building, having let the upper stories, neglected to repair a drain in the cellar, whereby the whole building was rendered unhealthy. *Held*, that the tenant might treat this as an eviction, quit the building, and refuse to pay rent.—*Alger v. Kennedy*, 49 Vt. 109.

See *Covenant; Evidence*, 6.

Lapse.—See *Devise*, 5.

Larceny.—The finder of lost property, who feloniously converts it to his own use, *animo furandi*, is guilty of larceny, though he does

not know who the owner is, if he has the means of finding him out, or has reason to believe, and does believe, that he will be found.—*State v. Levy*, 23 Minn. 104.

Lease.—See *Covenant*; *Evidence*, 6; *Trust*, 2; *Vendor and Purchaser*.

Libel.—In an action for publishing a libel in a newspaper, the defendant may show, in mitigation of damages, that he copied it from other newspapers.—*Hewitt v. Pioneer Press Co.*, 23 Minn. 178.

Licenses.—See *Game*.

Lien.—See *Mechanics' Lien*.

Life Insurance.—See *Insurance (Life)*

Limitations, Statute of.—1. Six years, in the Statute of Limitations, means six calendar years, and not a period of so many days as are contained in six calendar years, if Sundays (when no process can be served) are not counted.—*Bell v. Lamprey*, 57 N. H. 168.

2. A debtor delivered to his creditor, in part payment of his debt, the promissory note of a third person, which was duly paid at maturity. *Held*, that this was a sufficient acknowledgment of the debt to suspend the operation of the Statute; but that the Statute began to run again from the time when the note was delivered to the creditor, and not from the time when it was paid.—*Smith v. Ryan*, 66 N. Y. 352.

Lord's Day.—See *Limitations, Statute of*, 1; *Trial*, 1.

Malicious Prosecution.—See *Judge*.

Mandamus.—A statute directed the commissioner of highways to open V. Street, in Philadelphia. To a *mandamus* requiring him to do so he returned that there was no such street. *Held*, on demurrer, that the return was good, though it contradicted the statute.—*Commonwealth v. Dickinson*, 83 Penn. St. 458.

See *Corporation*, 3.

Marriage.—See *Divorce*.

Measure of Damages.—See *Damages*.

Mechanics' Lien.—Furnishing materials and labor in putting a lightning-rod on a house, is not furnishing materials and labor "in building, altering, repairing, or ornamenting" the house, within the meaning of mechanics' lien law.—*Drew v. Mason*, 81 Ill. 498.

Minomer.—See *Evidence*, 5; *Indictment*, 2.

Mistake.—A mortgage of a railroad to trustees was made and recorded. By inadvertence, words of inheritance were omitted; but it

was plain from the whole instrument that the trustees must take a fee in order to execute the trust. *Held*, that the mortgage should be reformed by inserting words of inheritance; subsequent incumbrancers being affected by the record with notice that a mortgage in fee was intended to be made.—*Randolph v. New Jersey West Line R. R. Co.*, 28 N. J. Eq. 49.

See *Evidence*, 5.

Municipal Corporation.—1. A city was authorized by its charter to obtain by contract or purchase the wharves within its limits, with power to raise a revenue from the same by establishing and collecting rates of dockage. *Held*, that the city had no power to acquire a wharf to be used by the public, free of charge.—*Mayor, &c., of Mobile v. Moog*, 53 Ala. 561.

2. A town, authorized by its charter to suppress and restrain billiard-tables, may license them.—*Winoski v. Gokey*, 49 Vt. 282.

See *Bona Fide Purchaser*.

Murder.—See *Evidence*, 1, 3.

Name.—See *Evidence*, 6; *Indictment*, 2.

Negligence.—1. Action by a child three years old to recover for injuries caused by defendants' negligence. *Held*, that negligence of the child's parents was no defence.—*Government Street R.R. Co. v. Hanlon*, 53 Ala. 70.

2. A. invited B. to drive with him, and they were both injured at a railroad crossing, by the negligence of the railroad. *Held*, that B. might recover damages whether or not A. was negligent, he being a competent driver, so that B. was not negligent merely in going with him.—*Robinson v. New York Central R. R. Co.*, 66 N. Y. 11.

See *Carrier* 3, 4; *Railroad*.

Negotiable Instruments.—Interest coupons on negotiable bonds of a corporation, payable to bearer, at a specified time and place, are negotiable separately, and are entitled to grace; and one who buys them within three days after the time specified for payment is a purchaser before maturity. But if not made payable to bearer, or order, they are not negotiable, nor entitled to grace.—*Everett v. Nat. Bank of Newport*, 66 N. Y. 14.

See *Bank*; *Interest*; *Payment*.

New Trial.—See *Trial*, 2, 3.

Notice.—See *Insurance (Fire)*, 1, 2.

Officer.—An officer is not bound to execute process which is voidable, though regular on its

face, and no action lies against him for refusing to execute it; though he is protected if he does execute it.—*Newburg v. Mumhower*, 29 Ohio St. 617.

Parent.—See *Negligence*, 1.

Passenger.—See *Carrier*, 3.

Payment.—Where a promissory note held by a bank, in which the maker is a depositor, is dishonored, and the indorser is duly notified, and the maker afterwards makes a deposit on his current account, the bank is not bound to apply it in payment of the note, and the indorser is not discharged.—*Nat. Bank of Newburgh v. Smith*, 66 N.Y. 271.

See *Limitations, Statute of*, 2.

Physician.—See *Witness*.

Presumption.—The law will not presume that a woman seventy-five years old cannot have children.—*List v. Rodney*, 83 Penn. St. 483.

Principal and Agent.—See *Agent*.

Principal and Surety.—See *Surety*.

Proximate and Remote Cause.—Plaintiff owned houses fronting on a street, on the other side of which was a river. Defendants, a railway company, occupied with tracks and buildings the street, and land beyond, which they made by partly filling up the river. Plaintiff's houses took fire, and were destroyed, the engines and firemen being unable to reach the river by reason of the obstructions caused by defendants. Held, that defendants' acts were not the proximate cause of plaintiff's loss; so that even if such acts were unlawful, defendants were not liable for the loss.—*Bosch v. Burlington & Missouri R. R. Co.*, 44 Iowa, 402.

Quo Warranto.—1. The Constitution provides that any candidate for office guilty of bribery shall be disqualified for holding office. Held, that an officer might be removed by *quo warranto* for obtaining his election by bribery, without being first convicted of the offence on an indictment.—*Commonwealth v. Walter*, 83 Penn. St. 105.

Railroad.—Where a statute made railroad companies liable for all damages caused by fire from their locomotives, and gave them an insurable interest on property exposed along their lines, held, that they were liable as insurers, and that it was immaterial whether the owner of property so damaged was negligent or not.—*Rowell v. Railroad*, 57 N. H. 132.

See *Carrier*, 1, 3, 4; *Contract*; *Damages*, 2;

Fixture, 2; *Foreign Attachment*, 1, 2; *Negligence*, 1, 2; *Tax*, 2; *Trust*, 1, 2.

Rape.—See *Evidence*, 1.

Receiver.—See *Foreign Attachment*.

Reprieve.—By statute, a reprieve granted to any person under sentence of death, on any condition whatever, shall be accepted in writing by the prisoner. Held, that the governor might grant a respite without conditions; that such reprieve need not be accepted; and that it might properly fix a future day for execution, which should then be done without further order of the court.—*Sterling v. Drake*, 29 Ohio St. 457.

Rescission.—A chattel was sold with warranty, and with an agreement that it might be returned if not satisfactory. Held, that the purchaser had a double remedy, and might sue on the warranty, though he had offered to return the chattel; the right to return being in pursuance, and not in avoidance, of the contract.—*Kimball Manuf. Co. v. Vroman*, 35 Mich. 310.

Revocation.—See *Agent*, 2; *Judgment*, 1.

Sale.—A sale by sample implies no warranty of quality, but merely that the goods are of the same kind as the sample, and merchantable.—*Boyd v. Wilson*, 83 Penn. St. 319.

See *Agent*, 1; *Corporation*, 2; *Rescission*.

Search-warrant.—A warrant appearing on its face to authorize the search of a dwelling-house for property belonging to the justice issuing the warrant, alleged to have been stolen, is absolutely void, and no protection to the officer who executes it.—*Jordae v. Henry*, 22 Minn. 245.

Sewer.—See *Tax*, 3.

Sheriff.—See *Officer*.

Statute of Limitations.—See *Limitations, Statute of*.

Stock.—See *Trust*, 3.

Sunday.—See *Limitations, Statute of*, 1; *Trial*, 1.

Surety.—A promissory note indorsed, due and unpaid, was replaced by a bond executed by the maker and indorser of the note to secure the same debt. Held, that the indorser, though in form a principal, was in equity only a surety on the bond.—*Merriken v. Godwin*, 2 Del. Ch. 236.

Tax.—1. A depositor in a bank took from the bankers a writing acknowledging the receipt of a certain sum equal to the amount of his deposit in United States bonds not taxable, and

promising to return the same on demand. *Held*, that this contract was lawful, though made for the express purpose of avoiding taxation on the deposit.—*Striwell v. Corwin*, 55 Ind. 433.

2. A tax on gross receipts of railroad companies was *held* to be a tax on the franchises and not on the property of the companies, and, therefore, not forbidden by the Constitution, which requires all direct taxes on property to equal and uniform throughout the State.—*State v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 45 Md. 361.

3. A statute authorizing assessments for sewers on such lots as the city council should determine to be increased in value by the improvement, in proportion to their superficial area, *held*, unconstitutional.—*Thomas v. Gisin*, 35 Mich. 155.

4. Action on a promissory note, the consideration of which was a license to cut timber on plaintiff's land in another State. Defence, that the consideration had failed, by reason of a sale of the land for non-payment of taxes by plaintiff. *Held*, that defendant must prove not only that the land was in fact so sold, but that all the proceedings in levying the tax and in the sale were regular.—*Bisbee v. Torinus* 22, Minn. 555.

5. Tax acts are presumed not to intend the imposition of a double burden; and, therefore, where the whole capital stock of a national bank was taxable and taxed under State laws, it was *held* that no further tax on the real estate occupied by the bank for its business could be levied, there being no law expressly authorizing it.—*Commissioners of Rice County v. Citizens' Nat. Bank*, 23 Minn. 280.

6. Notice of the sale of land for non-payment of taxes is required by statute to be posted in some public place in the town or place where the land is situated. A tax sale of land in a settlement was *held* void when no notice had been posted anywhere in the settlement, though the settlement consisted only of six houses on separate farms, and contained no church, school-house, inn, shop, sign-post, or public highway.—*Cahoon v. Coe*, 57 N. H. 556.

7. By statute, all buildings belonging to charitable institutions, together with the land actually occupied by them, are exempt from taxation. A charitable corporation occupied

land owned by it, and other land of which it had a lease, wherein it covenanted to pay the taxes. *Held*, that the former land was not taxable, but that the latter was.—*Humphries v. Little Sisters of the Poor*, 20 Ohio St. 201.

Telegraph.—See *Constitutional Law*, 2.

Tender.—1. A tender of the amount due on a promissory note secured by mortgage, made on the condition that the mortgage should be cancelled, is not sufficient.—*Storey v. Krewson*, 55 Ind. 397.

2. A tender of a debt due, without costs, if made before a writ has been served on the debtor, though after it has been sued out and delivered to an officer for service, is sufficient.—*Randall v. Bacon*, 49 Vt. 20.

Time.—See *Insurance (Life)*, 1; *Limitations, Statute of*, 1.

Toll.—See *Corporation*, 1.

Trial.—1. A case was committed to a jury on Saturday night. *Held*, that the court might come in and receive their verdict on Sunday.—*Reid v. The State*, 53 Ala. 402.

2. *Semble*, that the admission of incompetent evidence is not cured by a subsequent instruction to the jury to disregard it.—*Scipps v. Reilly*, 35 Mich. 371.

3. Where the judge at *nisi prius* suffered counsel, in opening the case, to read, against objection, papers not admissible in evidence, *held*, that this was such an abuse of his discretion as to require the granting of a new trial.—*Ibid*.

Trust.—1. A railroad corporation mortgaged its road to a trustee to secure payment of its bonds. After the trustee had taken possession of the road for default in payment of the bonds, he bought large quantities of the bonds, and afterwards sold them at an advance. *Held*, that he was bound to account to the corporation for the profits so made by him.—*Ashuelot R. R. Co. v. Elliot*, 57 N. H. 397.

2. He also leased land of the corporation to another corporation of which he was a director. *Held*, that the lease was voidable, but that the lessees should be allowed for improvements made by them.—*Ibid*.

3. A corporation increased its capital, allowing each stockholder to take at par as many new shares as he held of the old. A fund had been invested in the stock in trust for a person for life, remainder over. The trustees sold part

of, their "options" to take the new shares, and bought new shares with the proceeds. *Held*, that the shares so bought went to the remainderman.—*Moss's Appeal*, 83 Penn. St. 264.

4. A trustee may be entitled on the termination of the trust to receive compensation out of the principal fund, in addition to his commissions on the income.—*Biddle's Appeal*, 83 Penn. St. 340.

See *Charity; Husband and Wife*.

Ultra Vires.—See *Bank*, 1, 2; *Municipal Corporation*, 1.

Usage.—See *Evidence*, 2.

Vendor and Purchaser.—Buildings demised by lease, giving the lessee the option to purchase, and insured for the lessor's benefit, were burned during the term, the rent being in arrear and the lessor collected the insurance. *Held*, that the lessee could not afterwards, by exercising his option to purchase, require the insurance money to be applied to satisfy the rent in arrear and the purchase money.—*Gilbert v. Port*, 28 Ohio St. 276.

Verdict.—See *Trial*, 1.

Waiver.—See *Corporation*, 3.

Warranty.—See *Rescission; Sale*.

Way.—When one grants a private right of way over his land, he is not necessarily debarred from erecting gates across the way; but whether it is reasonable and proper to do so is a question for the jury.—*Baker v. Frick*, 45 Md. 337.

See *Eminent Domain; Mandamus*.

Will.—At common law, the marriage of a *feme sole* revokes her will; and her husband's consent to the probate of a will made by her before marriage does not make the will valid, but all her personal property not reduced to possession by her husband during her lifetime is to be distributed among her next of kin.—*In re Carey*, 49 Vt. 236.

Witness.—1. A physician may be compelled to testify as an expert, without payment of anything beyond the ordinary witness fees.—*Ex parte Dement*, 53 Ala. 389.

2. A resident of a foreign State, while attending court as a witness, cannot lawfully be served with a summons in a civil action, even though he is not arrested.—*Person v. Grier*, 66 N. Y. 124.

3. Where the law provides no means for compelling a witness to appear before a justice of the peace and give his disposition, and his

costs, if he does attend, are not taxable in the suit in which the deposition is taken, one who is cited so to appear, and does appear, cannot recover his expenses of the party who cites him, if the latter fails to appear and take the deposition.—*Felt v. Davis*, 49 Vt. 151.

See *Evidence*, 4, 7.

GENERAL NOTES.

ADVERTISEMENTS sometimes write the history of a people or class as completely as do the inscription and characters found on Egyptian monuments, indicate to us the every-day life and customs of a people long departed. And we learn from an inspection of the advertising columns of the London *Law Times* how our professional brethren across the water manage many things. The purchase and sale of an established "Law Practice" seems to form quite an element of trade, judging from the numerous notices. In most instances the value of the practice, *i. e.* the yearly income is given. Again, the purchase, for a consideration, of an interest as partner in a law firm is of frequent occurrence in the column devoted to "wants." Others advertise themselves as professional *costs* draftsmen and accountants, while not a few "admitted" lawyers advertise for situations as "managing clerk." No professional cards of Attorneys and Solicitors, as are seen in American publications, are found, and no member of the profession advertises "special attention" given to any particular branch of the law, while "Touting" in the profession is regarded as it should be everywhere, as unworthy the dignity of a lawyer.—*Chicago Legal News*.

WOMEN IN THE COURTS.—The London *Law Times* says: "The Master of the Rolls does not appear to have approved of Mrs. Besant having determined to conduct her own case before his Lordship. The question is as to the custody of her infant child. Hence the following inquiry by the learned judge when Mrs. Besant did appear before him: His Lordship.—Does the lady really appear in person? Ince believed so. His Lordship.—This certainly is not a case to be argued by a lady in person. Ince said it was not for him to express any opinion upon it, whatever opinion he might entertain. His Lordship.—But it is for me; I consider it would be a shocking waste of the time of the court, and very likely it would be useless for the lady to attempt to argue the case, as it involves some very nice points of law. Has she a solicitor? Ince.—Yes my Lord. His Lordship.—Is he in court? Mrs. Besant.—No my Lord, he is not in court. Some solicitors are exercised in mind as to what was his Lordship's object in inquiring for the solicitor, and what course he would have taken, had the solicitor been present."

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JUDICIAL OVERWORK.

Never before were complaints of judicial prostration from the effects of overwork so universal. In the U. S. Senate, a few days ago, in the course of a discussion on a bill to provide an additional Circuit Judge, Senator Davis stated some facts illustrating the immense pressure on the Federal Judges. At the April term of the Circuit Court in New York, 444 jury cases were set down for hearing; on the Equity Calendar there were 116 cases. There were also 59 appeals in Admiralty, and 40 motions noticed. In Chicago, the accumulation of arrears was still more formidable. There were 3,500 cases on the docket other than bankruptcy cases, which, with Admiralty business, engage all the time of the District Court at that place.

To the increasing pressure upon the Judges is ascribed the large mortality in their ranks. The *Albany Law Journal*, in noticing the decease of Judge Allen, of the New York Court of Appeals, which occurred on the day following the death of Judge Dorion, of Montreal, remarks that of the seven Judges who formed the Court at its re-organization, under the amended judiciary article of the constitution, three have been removed by death—Judges Peckham, Grover, and Allen. Judge Johnson, who was appointed to fill a vacant place upon the bench, and who performed judicial duties for nearly a year, had also died. "None of these," remarks our contemporary, "were what could be called old men, not one of them having passed the constitutional limit of age for the judicial office. There is no doubt that the physical constitution of every one of these Judges was broken down by overwork in the performance of official duties, and that, except in the case of Judge Peckham, their deaths resulted from this cause." In England and Canada, the results of overwork on the bench have been equally apparent. Is the present generation less able to stand pressure, or is the accumulation of case law, and the frequent change of statutes, in con-

junction with overweighted rolls, becoming too heavy a burden upon those called to administer the law? One thing at least is clear, that the judicial office is very far from being a sinecure, and instead of being eagerly grasped at, or accepted as a matter of course when tendered, should be undertaken only after the most serious consideration, and with a due regard to the sacrifices involved in the faithful and conscientious discharge of its duties.

TRADE MARKS.

A decision given recently by the Chancery Division in England, in the case of *Siebert v. Findlater*, goes very far in protecting manufacturers in the enjoyment of the marks by which their goods are usually known. In 1830, the plaintiff manufactured certain bitters at Angostura, a town in Venezuela, and he called the article "Aromatic Bitters." It was not till 1876 that he adopted the name "Angostura Bitters." In 1863 these bitters had been introduced into England, and obtained the popular name of "Angostura" Bitters, which they always retained. The defendant was also a manufacturer of bitters. He commenced to manufacture them at Upata, about 200 miles from Angostura, in 1860. In 1870 he removed to Ciudad Bolivar (formerly called Angostura.) About the year 1874 the plaintiff brought an action in Trinidad to restrain defendant from using the word "Aromatic" to describe his bitters, which was successful. The defendant then adopted the name "Angostura," and on the 16th August, 1874, registered that name at Stationers' Hall. The plaintiff now brought this action to restrain defendant from using the name "Angostura," and from using bottles and wrappers resembling those used by him. The Court held that, as the bitters made by the plaintiff were known in the market as "Angostura" bitters, and as the bitters made by the defendant were not identical with those of the plaintiff, the defendant must be restrained from using the name "Angostura" in such a way as to induce the public to believe that they were purchasing the plaintiff's bitters. Thus not only the name first selected was protected, but that which appears to have been given by the public.

PARDONS.

Two points in connection with the granting of pardons and commutations of the death penalty have recently come before Courts in different States of the Union. In one case, the matter of *Victor*, the convict had been sentenced to death, but the sentence was commuted to imprisonment for life. Subsequently the criminal claimed his discharge, on the ground that he had never accepted or acquiesced in the commutation, and therefore, he was held in custody illegally. The Court decided against this novel pretension, and the Supreme Court of Iowa affirmed the decision, holding that the commutation is presumed to be for the culprit's benefit, and is valid without any action on his part.

In the other case, *Arthur v. Craig*, which came before the Supreme Court of Iowa, in April, the question was whether a condition may be annexed to a pardon. In this instance, a person convicted of larceny from a building in the night time, and sentenced to ten years' imprisonment, received a pardon containing these conditions: that the prisoner should, during the remainder of his term of sentence, refrain from the use of intoxicating liquors as a beverage; should exert himself for the support of his mother and sister, and should not be convicted of a violation of any criminal law of the State. In case he violated any of these conditions he was to be liable to summary arrest upon the warrant of the governor at the time, whose judgment was to be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and was to be confined in the penitentiary for the remainder of the term of his sentence. The prisoner formally accepted the pardon and its conditions, and was set at liberty. He violated the condition against the use of intoxicating liquors, and was arrested upon a warrant by the governor and returned to the penitentiary. Upon proceedings by *habeas corpus* the court held the re-arrest and return to the penitentiary were valid and proper. The *Albany Law Journal* remarks: "Whether an executive can impose conditions in pardons has been doubted. 1 Whart. Cr. Law, §591 d. But it is now considered as settled that such conditions may be made. This is eminently the case where the offender, after having been released upon

condition that he leave the country, refuses to go or surreptitiously returns. *Flood's Case*, 8 W. & S. 197; *State v. Smith*, 1 Barley 283; *People v. Potter*, 1 Park. Cr. 47; *State v. Chancellor*, 1 Strobb. 347; *State v. Fuller*, 1 McCord, 178; *Roberts v. State*, 14 Mo. 138."

REPORTS AND NOTES OF CASES.**COURT OF QUEEN'S BENCH.**

Quebec, June 1, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

MARQUIS V. VAN COURTLANDT.

Appeal—*Saisie-Arrêt*—*Costs*.

Motion to reject an appeal on account of *acquiescement*. The appellant was condemned by the Court below to pay a certain debt, he not having made his declaration as *tiers saisi* in time. In fact he was domiciled in another district, and had there made his declaration, that he owed nothing, within the proper delay. He then moved the Court in Arthabaska to revise this judgment, and to allow him to make his declaration anew. The Court granted the appellant's petition, but condemned him to all costs. He moved for leave to appeal, but in the meantime so far conformed himself to the amended order as to make the new declaration. Respondent maintained that this was an *acquiescement*.

The Court held that it was not, and the motion to reject the appeal was dismissed with costs.

Quebec, June 4, 1878.

Present:—MONK, RAMSAY, TESSIER, CROSS, JJ.

HARDY V. SCOTT.

Appeal—*Alteration of Judgment*.

This was an action for rent due and to fall due. It seems that the judgment went for the rent due, but owing to some inadvertence, judgment was entered up according to the conclusions of the declaration. Execution was taken out on the judgment as entered, and this appeal was instituted.

Seeing the error, the *Greffier*, it seems, (though the affidavit does not make the point clear) entered up the proper judgment on another page, supposing himself authorized so to do by

Art. 474 C. C. P. The appellant moved for a *certiorari* to bring up the first judgment.

The Court granted the motion, remarking that the appellant certainly had a grievance. The judgment from which he appealed had been changed without his knowledge, and the Court should be in a position to give him a remedy. It was also intimated that Art. 474 C. C. P. would not cover an alteration of this kind after proceedings had been taken on the judgment.

PIÉRON V. BELISLE.

Appeal—Interlocutory Judgment.

Action for price of sale. The defendant pleaded by preliminary exception that there were two mortgages enregistered on the property, and asked suspension of the proceedings till this trouble was removed. The plaintiff produced two receipts *sous seing privé* and the Court dismissed the exception, except as to costs, which plaintiff was condemned to pay to defendant.

From this judgment the defendant moved for leave to appeal.

The Court thought that the matter might be rectified on the final judgment, and the case being for a very small amount, the Court in its discretion refused leave to appeal, but without costs.

LAROCHELLE V. REID.

Appeal—Default to file Reasons.

Motion to reject appeal, the reason of appeal not having been filed till the day before the opening of the term.

The Court granted the motion. The strict right of respondent was to have appeal rejected unless appellant could show some ground for mitigating the severity of the rule. No such ground had been shown in this case. It was an appeal purely for delay. Appellant, an insolvent, was condemned to answer interrogatories. He could suffer no great damage from complying with such an order. Motion granted.

SUPERIOR COURT.

Montreal, May 31, 1878.

JOHNSON, J.

THE ONTARIO BANK V. LIONAIS et al.; LIONAIS, opposant, and PAPINEAU, contesting.

Will—Clause exempting from Seizure—Debt of Succession.

The party contesting the opposition got two judgments against the two defendants, one of them being testamentary executor of his deceased wife, and the executions issued in satisfaction of these judgments were noted as oppositions *afin de conserver*, a previous writ having issued.

JOHNSON, J. The opposant pretends that the property seized is incapable of being taken in execution, in virtue of a provision in his mother's will, and this pretension is contested, because the judgment being against the defendant in his quality of executor and administrator to his wife's succession, and the debt being a debt due by the succession, the provision in the will cannot extend to exclude it. It is proved, as a matter of fact, that the judgment was rendered for money advanced to pay the debts of the testatrix herself. It is, therefore, obvious that she had no power to prevent the property of her succession from being liable for her debts. When her children get it, and their creditors want to sell it, it will be time enough to set up the exemption from seizure under the will.

Opposition dismissed.

Jetté & Co., for plaintiff and contestant.

LA COMPAGNIE DU CHEMIN DE FER DE MONTREAL, OTTAWA & OCCIDENTAL V. BOURGOUIN et al., and ATTY. GEN., Opposant.

Railway—Execution—Appeal—Opposition founded on title.

The plaintiff's action was dismissed, and the defendants' attorneys took a writ of execution for their costs. The Crown filed an opposition which rested upon two grounds: 1st, that the judgment had been appealed from and was therefore not executory; and secondly, that the property seized belonged to the opposant. The first ground was answered by the defendants, who contested this opposition, by an exception in the nature of a dilatory exception, setting up that the appeal was only taken eight months after the judgment, and four after the execution, and that, therefore, the opposition can only be made subject to the payment of costs resulting from the delay and negligence of the party in taking the appeal.

JOHNSON, J. The fact of the appeal either as

a ground of the opposition, or of dilatory exception to it is equally fallacious. The appellant might urge the pendency of an appeal; but the opposants have no interest whatever in doing so; and on the other hand, the defendants might reproach the plaintiffs with delay in taking their appeal; but that is nothing to the opposants. At most, however, this would resolve itself into a question of costs, for even if the opposants had exposed themselves to pay costs by their own negligence, they would not be prevented from exercising a right of property, if they have one. The question of property, as a matter of fact is admitted:—that is to say the transfer of the 16th of November is admitted as a fact, without admitting the legal consequences of it.

The contestation rests mainly on the argument that the Provincial Statute 39 Victoria, c. 2, is *ultra vires*, because this railway has ceased to be a provincial railway, and has become a Canadian railway under federal legislation. Thence it is concluded that the sale made to the Crown is null, and that the property seized belongs in reality to the plaintiffs, though nominally and apparently to the Crown, and that consequently the defendants can bring it to sale to pay the plaintiff's debts.

Now all the cars and locomotives as well as the greater part of the land seized never belonged to the plaintiffs at all; but were bought and paid for with public money through the Railway Commissioners.

There remain, however, some lands which the plaintiffs themselves had bought before the 16th of November, and as to these last, the question might be raised whether the transfer of that date is legal or not. But it strikes me very forcibly that the contestation does not raise the point in any way that could be effectual, even if it is well founded; for I see that though the fact of the transfer is admitted, and the deed itself must therefore subsist until it is set aside, there is no conclusion that it be declared null, but simply that the opposition be dismissed. This was not noticed at the argument; but I must say it appears to me very seriously to affect the contestation of the opposition, for it is difficult to see how this deed, whatever it may be, is to be allowed to stand while at the same time the opposition founded upon it is to be dismissed. But it may further

be noticed that whether the Stat. 39 V., c. 2, is to have the effect claimed for it or not, is a question quite independent of the right of the plaintiffs to sell lands no longer useful to them for the objects of their incorporation. The Quebec Railway Act of 1869, sec. 7, sub-sec. 2, gives them the power to purchase and to alienate. This company had been incorporated to build a railway. It became incapable of achieving its object. By the deed of November, 1875, this is declared to be the reason of the transfer to the Province, which then undertook the work. The Act 39 V., c. 2, no doubt recognised the necessity of federal legislation to carry out the work; and indeed it appeared to me in this very case, and I said so in giving judgment dismissing the action, that the plaintiffs were in no position to question whether this work was a Provincial or a Canadian railway, they themselves having asked for the federal legislation that changed their name; but the question whether it is to be considered either the one or the other has nothing to do with the right of the stockholders to sell to the Crown, which would be the same in either case. I have already quoted the specific power given by the Quebec Statute of 1869, and that given by the Federal Railway Act, 1868, in precisely the same words. I am therefore of opinion to maintain this opposition, on the ground of the right of property being in the Crown.

The contestation was made also to some extent to rest on the contention that the opposants were in reality only using the plaintiffs' name. That might be the case, however, without enabling the defendants to sell the opposants' property under this execution, unless the judgment was executory against them, which it is not; but only against the plaintiffs.

De Bellefeuille & Turgeon for opposant.

Doutre & Co. for defendants.

McMAHON v. LASSISERAYE, and LASSISERAYE et al., Opposants.

Seizure—Usufructuary.

This was a case of contested opposition, the contestation being about effects claimed by the opposant as *legataire en usufruit* of her deceased husband, and tutrix to their children.

JOHNSON, J. These oppositions are contested by the plaintiff on the ground of the things

seized belonging to the defendant personally being purchased with her own money. The proof of this however has failed. The piano is the result of two or three exchanges—and on the last occasion some money was paid to make up the difference. I have no doubt the contestations are not maintainable. Even if she paid her own money to make up the price of the last piano, that would make her part owner individually, and therefore under this seizure her share could not be sold. Oppositions in both cases maintained, and contestations dismissed with costs, on the ground that the property seized is that of her children, of which she has only the usufruct.

Duhamel & Co. for opposant.

DUCHARME V. ETIENNE.

Obligation by Wife — Community—Renunciation.

JOHNSON, J. This action is brought by the plaintiff—or rather is now directed by the plaintiff's two sisters (he himself being dead)—against the defendant as tutor to the minor child, issue of the marriage of the late Gilbert Brunet and Eulalie Jobin, who, after her first husband's death, married Roch Thibault. She herself died in May, 1878, leaving by her will her two children universal legatees. One of them, however, had died before her; and it is against the tutor of the surviving child of the first marriage that the present action is brought.

The first thing alleged is the execution by Eulalie Jobin and her second husband of two obligations, the first in September, 1875, and the second in September, 1876. The first obligation was for the sum of \$1200, payable to the plaintiff by the obligors jointly and severally, in five years, with interest at eight per cent., payable half yearly; and the second was for \$200, between the same parties, payable on the plaintiff's order, with interest at the same rate, and in the same manner; and a lot of land belonging to the wife was mortgaged for both these amounts, and the mortgages duly registered. It is then alleged that the consideration of these two obligations was a debt due by the wife, and the real estate mortgaged was hers *en propre*, and that the surviving child, or her tutor for her, have taken possession of everything under the will; and the conclusions are that the tutor *es qualifié* be condemned

to pay \$208, the interest due under the two obligations.

The defendant pleads that he never accepted as tutor the community between the minor's mother and Roch Thibault, but on the contrary expressly renounced it on the advice of a *conseil de famille*. That the money mentioned in the two obligations did not go to pay the wife's debts. That when she married Thibault, the property in question was already mortgaged for \$950, and, by the marriage contract, the husband offered to pay \$200 of it; and as to the balance, he undertook to pay one-half, viz.: \$375. Thus her succession would only benefit to that amount, and he offers the interest on it, calculated from the date of the obligations, some \$60, with costs as in an action of that amount. The defendant further says that the present action is instigated by Roch Thibault, who hopes to escape thereby from his personal liability. The plaintiff answers, first, by saying that this contract of marriage was never registered, and that whatever it may mean, as between the parties to it, it means nothing as regards him; and that even if Thibault had undertaken with his wife to pay her debt, that would not discharge her towards her creditor, but merely oblige him to re-imburse her.

There was proof offered and made under reserve of objection that the consideration of the obligations was a debt due by the wife, and I think the proof is clear on that head, and ought to be allowed, particularly with the basis afforded by the confession of the defendant, and the original obligation by the wife during widowhood to the Trust and Loan Company. The renunciation to the second community made by the Tutor cannot affect the antecedent liabilities of the wife, and though the second husband may be liable to the minor for \$200, her succession is liable to the plaintiff for the rest. Judgment for plaintiff.

Loranger & Co. for plaintiff.

Duhamel & Co. for defendant.

In the Southwark, England, County Court on the 28th of March last, in the case of *Poice v. Jacob*, it was held that a London carman is not a common carrier, but is liable to loss or injury of property transported by him, caused by the criminal act of a stranger, occurring through his criminal negligence as bailee.

PRIVITY IN NEGLIGENCE.

The Court of Appeals in *Robinson v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 11, manifested an unusual degree of timidity or rather caution in regard to the question of imputed negligence. The facts of that case were that the plaintiff—a woman—was invited to ride by one Conlon in his carriage and accepted the invitation. Conlon was a fit and proper person to manage a horse; but through the alleged negligence of the defendants' servants, its train was run against the carriage, and plaintiff was injured. The defendants alleged that the negligence of Conlon contributed to the injury, and that this negligence was imputable to the plaintiff, but the court below charged that even if Conlon was negligent the plaintiff would not be responsible therefor, and this ruling was sustained by the Court of Appeals. The opinion of the court ends thus: "It is not intended by this decision to establish a rule which will embrace cases not within the facts developed in this case, as construed by the court and found by the jury."

The English decisions are undoubtedly in favor of privity in negligence. The point was first raised in *Thorogood v. Bryan*, 8 C. B. 115, which was an action under Lord Campbell's act. The deceased, wishing to alight from an omnibus in which he was a passenger, got out while it was in motion, and without waiting for it to draw up to the curb; and, in doing so, he was knocked down and fatally injured by an omnibus belonging to the defendant. Williams, J., who tried the cause, told the jury that if they were of opinion that want of care on the part of the driver of the omnibus in which the deceased was travelling, or on the part of the deceased himself, had been conducive to the injury, their verdict must be for the defendant. A rule for a new trial on the ground of misdirection having been obtained, was, after consideration, discharged by the court, Coltman, J., observing: "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting a particular conveyance, the plaintiff has so far identified

himself with the owner and her servants, that if any injury results from their negligence he must be considered a party to it." To the same effect Maule, J., says: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it."

A like decision was come to in the case of *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, where it was held in a case of a collision between two trains, that the plaintiff must show the accident to be due exclusively to the defendant's negligence, and that joint negligence of the defendant, with other persons having charge of the train in which the plaintiff was travelling, was not sufficient.

In *The Milan*, Lush. Adm. 388, Dr. Lushington said he would not be bound by and did not approve of *Thorogood v. Bryan*, and in the note to *Ashby v. White*, 1 Smith's L. C. (6th Eng. Ed.) 266, that case was sharply criticised. See, also, S. C., 7th Am. Ed. at p. 481. And consult *Rigby v. Hewitt*, 5 Exch. 240, and *Greenland v. Chaplin*, id. 243.

The question was again directly involved in *Child v. Hearn*, 22 W. R. 864; L. R., 9 Ex. 176. The facts of that case were as follows: The plaintiff, a plate-layer, in the employment of a railway company, was returning from work along their line upon a trolley, when some pigs belonging to the defendant escaped from his field, which adjoined the railway, and running on to the line in front of the trolley, upset it, thereby causing the injury to the plaintiff, for which he sought to recover damages from the defendant. A verdict was entered for the plaintiff, which the court afterward set aside, holding that the company had not maintained a sufficient fence under 8 Vict., c. 20, s. 68, and that the plaintiff could not recover, since he was identified with the company whose line he was using for their purposes. Bramwell, B., in his judgment, observed: "The plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs

got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person using the property through the license of the owner, and on his behalf, can. The servant can be in no better position than the master when he is using the master's property for the master's purposes. Therefore, without saying anything as to the decision in *Thorogood v. Bryan*, it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant."

This decision has recently been followed by the same court in the case of *Armstrong v. The Lancashire and Yorkshire Railway Company*, 23 W. R. 295; L. R., 10 Ex. 47. The plaintiff, who was in the employ of the London and North-Western Railway Company, sued the defendants, over whose line the North-Western have running powers, for compensation for an injury he had sustained from a collision between some of the defendant's trucks and a North-Western train in which he was travelling. It appeared that the North-Western train being late, the station-master at one of the defendant's stations ordered the trucks in question to be shunted, the signal being put at "danger" while this was being done. Notwithstanding this, the driver of the North-Western train came on, and the collision ensued by which the plaintiff was injured. The jury found that there was negligence in the defendants in shunting at a time when the North-Western train was overdue, and in the driver of the latter in disregarding the signals, and it must be assumed that it was on the part of the defendant's negligence proximately contributing to the accident. A verdict was thereupon entered for the defendants, which the court refused to disturb.

BRAMWELL, B., said: "I am of opinion that this rule must be discharged. It is impossible, I think, to distinguish the present case from *Thorogood v. Bryan*, except in one particular, and that is in the defendants' favor. It must not be supposed, so far as my individual opinion is of any value, that I am at all dissatisfied with the decision in *Thorogood v. Bryan*. It has been admitted by Mr. Pope that, if his

contention is right, the owner of a bale of goods, which was being carried by the defendants, and had been damaged by an accident similar to the one from which the plaintiff has received injury, would be entitled to have an action. The learned counsel was also constrained to admit that if a carriage had been let to hire and injured by the joint negligence of its driver and the driver of another carriage which came into collision with it, the owner of the hired carriage could maintain an action for compensation for such damage. These, I confess, seem to me to be startling propositions. But there is another difficulty. If the present action is maintainable against the defendants, it is upon the ground that they were joint wrong-doers with the London and North-Western Railway Company? If so, there is this difficulty, that one of the wrong-doers is so through contract, and the other by tort. Can there be a joint liability with regard to the negligence or breach of duty toward the plaintiff, and no joint liability as to the contract under which he was being carried? Would another action be maintainable against the London and North-Western Railway Company? Suppose that the plaintiff had merely been an ordinary passenger, could he maintain one action for breach of contract against the London and North-Western Railway Company which carried him, and also another action against the defendants, through whose negligence the coal wagons which caused the accident were left on the line of railway? These are questions worthy of consideration; and in this particular case there is, I think, good reason for holding that the rule in *Thorogood v. Bryan* should apply, however unreasonable it may at first sight appear to be. The plaintiff cannot bring an action against the London and North-Western Railway Company, because he was their servant; and yet it is said that he may maintain an action against another company, the defendants, who only contributed to, and certainly were not the proximate cause of the mischief. It would follow from that, therefore, that the servants of a railway company, may in case of a collision sue what I may call the opposing company, but that they cannot sue the company who were the proximate cause of the injury suffered by them. Surely a most preposterous consequence. I am, however,

prepared to decide the present case on the authority of *Thorogood v. Bryan*, which, though it may have been questioned and impeached, has never been overruled, and has since been acted on. But, as I have already said, I think this case is distinguishable from that case, and in a point that is favorable to the defendants, and that the latter are entitled to avail themselves of it upon this rule, notwithstanding that there is no cross rule. Certain points were put by the learned judge to the jury, and he reserved leave to the plaintiff to enter a verdict on the ground that, if the findings of the jury were supported by the evidence, and these findings showed the plaintiff to be entitled to the verdict, then it should be entered for him. Now, in assenting to leave to move to enter a verdict against him, the learned counsel for a defendant does not consent to have the matter decided against him and the rule made absolute without regard to the verdict of the jury. He must be taken to adopt the proceedings only so far as they are supported by the evidence. The question whether there was any evidence of negligence in the defendants was left open. The point may be put thus: The defendants, doubtless, were guilty of negligence, but it was negligence the consequence of which the other railway company might have avoided by the use of reasonable care; and it is clear to my mind that the defendants might have maintained an action against the London and North-Western Railway Company to recover compensation for the damage sustained by their coal wagons by reason of the collision, for which the case of *Davies v. Mann*, *ubi sup.*, is an authority; and if that be so, it would be highly unreasonable that the plaintiff should have this action against the defendants."

POLLOCK, B., said: "I also think that this rule should be discharged. It is sufficient to say that I think the case not distinguishable from *Thorogood v. Bryan*, and is governed by that decision. I must not be taken as in any way expressing dissatisfaction with the decision in that case. The only difficulty I have had in applying it has been in consequence of the use of the word 'identified' in the judgment of the court there. If the court are to be taken as meaning by that word that the plaintiff, by his own proper conduct, as by the

selection of the omnibus in which he was riding, so acted as to constitute the driver his agent, the proposition would, I think, be an unsustainable one. But I do not understand the word to be used in that sense. I take the court to mean by it that, under the circumstances of the case, the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. The case of *Waite v. The North-Eastern Railway Company*, E. B. & E. 719, is an illustration of this, where the child, as far as regards contributory negligence, was 'identified' with its grandmother, in whose charge it was, although it could not be said that the child exercised any volition in the selection of its grandmother for its companion. If, then, the rule laid down by Parke, B., in *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, that 'although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care, have avoided the consequence of the defendants' negligence, he is entitled to recover; if, by ordinary care, he might have avoided it, he is the author of his own wrong,' be adhered to, it seems to me that no hardship follows, inasmuch as the plaintiff is only in the same position as the donkey in the case of *Davies v. Mann*, 10 M. & W. 546, and, notwithstanding the carelessness of the driver of the train he was travelling by, he would be entitled to recover against the defendants, supposing that their negligence was of a similar character to that of the defendant in *Davies v. Mann*. It may be said, why should he not have a right of action against both companies? The answer to that question is that a man may have an action against two tort-feasors for any act causing the injury; but there is no hardship in saying that, if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action against the other, for the plaintiff must show that the negligence of the one whom he sues was the proximate cause of the accident. Therefore, I think that the defendants are entitled to our judgment."

It is to be observed of this case, that the plaintiff was the servant of the company in whose train he was travelling, and was therefore precluded from suing them for the injury

which arose from the negligence of their servants.

In this country the prevailing opinion is unquestionably against imputed negligence. *Shearman & Redfield on Negligence*, § 46; *Wharton on Negligence*, § 395. In *Chapman v. The New Haven Railroad Co.*, 19 N. Y. 341, the Court of Appeals of this State held that a passenger by railroad is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part, and could recover for personal injuries from a collision through negligence of the defendant, although there was such negligence contributing to the collision on the part of the train conveying him, as would have defeated an action by its owners. And in *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y., 492, it was held that the injured passenger could maintain his action against the proprietors of both, on the ground of their concurring negligence. These cases were followed and approved in *Webster v. Hudson River Railroad Co.*, 38 N. Y. 260.

So in *Metcalf v. Baker*, 1 Abb. (N. S.) 431, the Superior Court of New York, at General Term, held as in the principal case, that one riding on invitation with the owner of a private vehicle was not chargeable with his negligence contributing to an injury, occasioned by the negligence of the defendant, to the plaintiff; and to the same effect are *Robinson v. N. Y. C., etc., R. R. Co.*, 65 Barb. 146; *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y. 39; *Knapp v. Dagg*, 18 How. Pr. 165.

But in *Payne v. The Chicago, Rock Island & Pacific R. R. Co.*, 39 Iowa, 523, where the plaintiff was injured at a railroad crossing, by a collision between the wagon in which he was riding and defendant's train, the court decided, without discussing the question, that the negligence of the one who was driving defeated plaintiff's right to recover, citing therefore, *Artz v. C., R. I. & P. Railway Co.*, 34 Iowa, 153. But the case is like that of *Beck v. East River Ferry Co.*, 6 Rob. 82, where the plaintiff and the one guilty of negligence were engaged in a joint enterprise. In the Iowa case, three neighbors, one of whom was plaintiff's intestate, were travelling for a common purpose in a wagon belonging to none of them, but procured for the purpose. They

drove by turns. The case was correctly decided, and is not an authority against the doctrine of the principal case.

In *Bennett v. The New Jersey Railroad Co.*, 7 Vroom, 225; S. C., 13 Am. Rep. 435, it was held that where a passenger in a horse car is injured by the carelessness of the engineer of a railroad company, in the management of his locomotive, it is no defence to show contributory negligence in the driver of the horse car.

In *Lockhart v. Lichtenhaler*, 46 Penn. St. 151, this question was considered at great length. The action was brought to recover damages under a statute by the widow and children of one killed by a collision between a train of cars and oil barrels owned by the defendant, and placed too near the track by his servants. The deceased was a brakeman on a car belonging to a coal company, but which was drawn by a locomotive belonging to the railroad and controlled by its servants. The court held that the deceased was not a servant of the railroad company, but that he "must be considered in the light of a passenger in charge of property being conveyed with himself by the railroad company for his employers," and that if the negligence of the railroad *directly* contributed to the accident, the defendant would not be liable. After a review of the authorities, Thompson, J., who delivered the judgment of the court, said: "If in this case there was no contributory negligence chargeable to those conducting the train, by which the cars in charge of the deceased were with himself being conveyed; in other words, if their negligence did not *directly* contribute to the disaster, although they may have been negligent in a *general sense*, the defendants will be answerable if the act of their servants or agents was the *proximate* cause of it. The negligence on the part of the train which would be a defence must be directly involved in that result; it must by itself, or concurring with the defendants, be the *proximate* cause of the death. For instance, running too rapidly on a road in bad repair, driving instead of drawing the train, would not abstractly be such negligence as would be a defence. To be such, the consequences of these acts, or some of them, must have directly entered into and become active agents in the very disaster itself. This must be the rule of all such cases."

Smith v. Smith, 2 Pick. 621, is frequently cited as an authority in support of the rule of *Thorogood v. Bryan*, but all that was decided in that case was that one who is injured by an obstruction placed unlawfully in a highway cannot maintain an action for damages if it appears that he did not use ordinary care by which the obstruction might have been avoided. This rule is well established, and is, we take it, not in conflict with the principal case. See *Styles v. Geesey*, 71 Penn. St. 439; *Cleveland, Columbus & Cincinnati R. R. Co. v. Terry*, 8 Ohio St. 570; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259; *Murphy v. Deane*, 3 Am. Rep. 390.

In *Puterbaugh v. Reasor*, 9 Ohio St. 484, the plaintiff put R. in charge of his team. It and the defendant engaged in a fight which frightened the team and it ran away, and one horse was killed. The defendant was held not liable because the plaintiff, having placed R. in charge of the team, was responsible for his negligence. Sherman and Redfield cite this case as well as that of *Cleveland, etc., v. Terry*, and *Smith v. Smith*, *supra*, as authorities for the rule of *Thorogood v. Bryan*, but they are obviously not so as to the question of privity in negligence.—*Albany Law Journal*.

AGENCY—RIGHTS OF AGENT AGAINST THIRD PERSONS IN TORT.

Any special or temporary ownership of goods, with immediate possession, is sufficient to maintain an action for conversion: *Legg v. Evans*, 6 M. & W. 36. An agent having such special property, with immediate possession, may maintain an action against the absolute owner for wrongful conversion, but can only recover damages in respect of his limited interest: *Roberts v. Wyatt*, 2 Taunt. 268. If an agent is not in possession at the time of the conversion, and has to rely upon his right only, he may be called upon to prove a good title, and the defendant will be allowed to rebut his title by showing a *jus tertii*: *Leake v. Loveday*, 4 M. & G. 972; *Gadsden v. Barrow*, 9 Ex. 514. Where the defendant has disturbed the actual possession of the plaintiff, he will not be allowed to set up a *jus tertii*, unless he can justify his act under the authority of the third party: *Jeffries v. The Southwestern Railway Company*, 5 E. & B. 802; 25 L. J. 107 Q. B.

First, as to the cases where the agent has been in possession of the goods or chattels in respect of which he sues:

In *Burton v. Hughes* (2 Bing. 183) the owner of furniture lent it to plaintiff under the terms of a written agreement. The plaintiff placed it in a house occupied by the wife of a bankrupt. The assignees of the bankrupt seized the furniture, and the Court of Common Pleas held that the plaintiff might recover it in trover without producing the agreement. "The case of *Sutton v. Buck*, 2 Taunt. 302, which has been referred to," said Chief Justice Best, "confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." In that case a person whose title was not completed by registry of a regular conveyance sued in trover to recover a ship of which he was possessed. "Suppose a man," observed Chief Justice Mansfield, "gives me a ship, without a regular compliance with the Register Act, and I fit it out at £500 expense, what a doctrine it is that another man may take it from me and I have no remedy." "There is enough property in the plaintiff," remarked Mr. Justice Lawrence, "to enable him to maintain trover against a wrongdoer; and, although it had been urged that the contract is void with respect to the rights of third persons, as well as between the parties, yet so far as regards the possession, it is as good as against all except the vendor himself."

The rule laid down by Mr. Justice Chamber, in the case cited by Chief Justice Best, is that an agister, etc., a carrier, a factor may bring trover. A general bailment will support the action, though the bailment is made only for the benefit of the true owner.

In *Rooth v. Wilson*, 1 B. & Ald., 59, which was an action on the case against the defendant, for the not repairing the fences of a close adjoining that of the plaintiff, whereby a horse of the plaintiff fell into the defendant's close and was killed, it was objected that the plaintiff had not such a property in the horse as to entitle him to maintain the action, he being merely a gratuitous bailee. A verdict having been found for the plaintiff, the court discharged a rule for a new trial. "I think," said Mr. Justice Abbott, "that the same possession which would enable the plaintiff to maintain

trespass, would enable him to maintain this action." Mr. Justice Holroyd based the liability of the defendant on the ground that the plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others.

Secondly, as to cases where the agent has not been in possession :

In *Fowler v. Down* (1 B. & P., 44), which was decided by the Court of Common Pleas in 1797, Chief Justice Eyre pointed out that it is not true that in cases of special property the claimant must have had possession in order to maintain trover, citing the case of a factor, to whom goods have been consigned, and who has never received them.

In *Bryans v. Nix* (4 M. & W., 775), a corn merchant, T, who had been in the habit of consigning cargoes of corn to the plaintiffs as his factors for sale at Liverpool, obtaining from them acceptances on the faith of such consignments, obtained from the masters of canal boats 604 and 54, receipts signed by them for full cargoes of oats deliverable to the agent of T in Dublin, in care for the plaintiffs. T inclosed the receipts to the plaintiffs, and drew a bill on them against the value of the cargo, which the plaintiffs accepted, on 7th Feb., and paid when due. On 6th Feb., W., an agent of the defendant, who was T's factor for sale in London, pressed T for security for previous advances, and T gave W an order on the Dublin agent to deliver to W, the cargoes of the boats on the arrivals. Only boat 604 was loaded when the receipt was given by the masters, and the acceptances were obtained from the plaintiffs. The loading of 54 was completed on the 9th, and T then sent to W a receipt signed by the master, similar to that sent to the plaintiffs, making the cargo deliverable to W, who took possession of both cargoes. The court held that the property in the cargo of boat 604 vested in the plaintiffs on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or other specifically appropriated to the plaintiffs when the receipt for that boat was given by the master.

"The transaction," said Baron Parke, who delivered the judgment of the court, "is in effect the same as if T. had deposited the

goods with a stake-holder who had assented to hold them for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not; and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depository—no matter whether such depository be a common carrier or shipmaster employed by the consignor or a third person—and the chattels are so placed on account of the person who is to have that property, and the depository assents, it is enough; and it matters not by what documents this is effected, nor is it material whether the person who is to have that property be a factor or not; for such an agreement may be made with a factor, as well as any other individual." In *Anderson v. Clark* (2 Bing 20) a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention to vest the property in the factor as security for the antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery. When, however, the relation between consignor and consignee is simply that of principal and factor, the latter has no such interest in consignments that have not come into possession as to entitle him to maintain trover against the carrier who claims a lien: *Kirloch v. Craig*, 3 T. R. 783.

Lord Ellenborough observed, in *Patten v. Thompson* (5 M. & S. 350), that "if it be taken that the cargo was consigned to the Liverpool house as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances on the responsibility they had contracted in respect of the cargo. But the case as it now stands seems to me to go further, and that the defendant, in order to succeed in his claim, must make out this position, that whenever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor upon account, the circumstance of there being mutual

credits between them, does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and to keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction, if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated, this would have been a different case."

In *Evans v. Nichol*, Scott, N. R. 43, which was decided in 1841, trover was brought for a quantity of alkali and potash, and the defendants pleaded that the plaintiffs were not possessed, of their own property, of the goods mentioned. At the trial, it appeared, that a manufacturer at Newcastle consigned the potash and alkali to E. & Co., their factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt signed by the mate of the vessel. The receipts acknowledged the goods to have been received for E. & Co. At the time of the shipment the consignor was indebted to the shipowners for freights due on former shipments. He became bankrupt, whereupon the shipowners refused to sign the bills of lading, claiming a general lien. The vessel reached London, and the shipowners sent to their agents there (the defendants) an order for the goods in question. The defendants received the goods, and refused to deliver them to E. & Co., the plaintiffs. An unsuccessful attempt was made to prove a custom to a general lien, and Chief Justice Tindal ruled upon the other question, that the circumstances of the alkali having, at the time of the shipment, been specifically appropriated by the consignor to the bill, vested such a property therein in the plaintiffs as to enable them to maintain trover. A rule *nisi* to enter a non-suit was discharged.

Maule, J., said, "Upon the delivery of the goods to the defendants to be delivered to the plaintiffs, and the defendants' acceptance of them upon those terms, the property vested in the plaintiffs, who had an interest in them, viz., the interest of persons with whom the goods were pledged. And this view of the case is strongly supported by the decision of the Court of Exchequer in *Bryans v. Nix*, 3 M. & W. 15. It is clearly competent to a man to

sell goods to another, and to vest in him the property, though the goods are not present. It is admitted that the plaintiff's right to recover would have been indisputable had the relation between Clapham (the consignor) and the plaintiffs been that of vendor and vendee, instead of pawner and pawnees. But the goods having been shipped by Clapham to the order of the plaintiffs upon their acceptance of the £500 bill, and the defendants having received them for the purpose of being delivered to the plaintiffs, and Clapham not having revoked the consignment, it appears to me that the plaintiffs acquired such an interest in the property and right to the possession as to entitle them to maintain trover against the defendants."

The case of *Haille v. Smith*, 1 B. & P. 563, bears a resemblance to *Evans v. Nicholl*. A, of Liverpool, wishing to draw upon the banking house of B in London, agreed, among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking house, though under the firm of B and C. Accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to B and C, but the cargo was prevented from leaving Liverpool by an embargo. A then became bankrupt, being considerably indebted to B, and the cargo was delivered to his assignee by the captain. It was held that B and C might maintain for the cargo against the captain.

In *Kinloch v. Craig*, (3 T. Rep. 783), *Bruce v. Wait*, (3 M. & W. 15), and *Nichols v. Clent* (3 Price, 547), there was no documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier.—*W. Evans*, in *London Law Times*.

Mr. H. C. Wethey, barrister-at-law, and reporter to the Court of Queen's Bench, Ontario, died on the 22nd ult. The deceased was called to the bar in Hilary Term, 1871, and succeeded Mr. Christopher Robinson as reporter of the Queen's Bench. As a reporter, Mr. Wethey was accounted most industrious and painstaking, while his amiable qualities gained him the esteem and affection of his professional brethren.

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THE INSOLVENT LAW.

In the course of the repeated discussions which have taken place in Parliament and elsewhere as to the expediency of abolishing the Insolvent Act, it has usually been claimed by the friends of the Act that the country could not get on at the present time without a law of this nature. It has been urged that business in these days has assumed such a form that bankruptcy legislation is an absolute necessity. The United States is a far more populous country than Canada; its business is much greater and more extended; and in progressiveness it is usually held to be exceeded by no other State. Yet the resolution has there been taken to dispense entirely with a bankrupt law. The vote for abolition has been carried by considerable majorities of the Legislature; the President has not withheld his sanction; and on the 1st September the United States will be freed at one stroke from the entire bankruptcy machinery.

This is an experiment which will be watched with interest on our side of the line. The causes which have made our neighbours weary of the law have been operating to a very large extent in Canada. We have seen as well as they the demoralising effect of providing an easy relief from obligations which the debtor would in many cases have been well able to discharge, but for the collapse occasioned by reckless trading and speculation or extravagant expenditure. We have seen old-fashioned thrift and prudence becoming rare qualities; stability of business disappearing; universal uncertainty prevailing; and traders shaping their course, long before the final collapse, to the end that they may be enriched by their resort to the friendly shelter of the bankrupt law. A rottenness has eaten into the heart of the system, as disgusting here as it has proved to be in the United States, and business would breathe more freely if the tainted mass could be swept from sight, even were the abolition to be but temporary.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, June 14, 1878.

PRESIDENT :—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER and CROSS.
PREVOST et al., Appellants; and **GAUTHIER**, Respondent.

Master and Servant—Travelling Agent.

The engagement of a clerk on a salary as travelling agent, to be engaged particularly in purchasing in the European markets, *held*, not to prevent his employers from using his time otherwise, so long as the occupation was not derogatory to his position in society.

RAMSAY, J., said this was an action by a clerk for salary claimed after his dismissal from service. The appellants, who were merchants, engaged Gauthier as travelling agent, and it was stipulated that he was to be employed particularly in purchasing in the European markets. He was also to perform other services in the warehouse of the appellants. After a certain time Gauthier refused to travel in the Lower Provinces, on the ground that it did not come under the terms of his engagement. The Court here was of opinion that Gauthier was not correct in this pretension. His bargain was as a general traveller, and he was bound to go wherever he was told. He was paid for his time and his employers were entitled to use it as they pleased, so long as they did not ask him to do anything that would injure his position in society. The judgment, which had maintained Gauthier's action, must be reversed.

Lacoste & Globensky, for appellant.

Jetté, Beique & Choquet for respondent.

RYAN et al., appellants, and **LAVIOLETTE**, Respondent.

Malicious Prosecution—Reasonable and Probable Cause.

Where a woman, not with intention to steal, but apparently to annoy a neighbor, appropriated a quantity of ice delivered to her neighbor, who prosecuted her for larceny, *held*, that she was not entitled to damages for malicious prosecution.

RAMSAY, J., said the case arose as follows:—One day Mrs. Crowley, the appellant, appropriated to herself about 130 pounds of ice that was intended for Laviolette. The latter caused her to be arrested, but she was discharged by the magistrate. She now brought an action of damages against Laviolette, who

pleaded that he had reasonable and probable cause for acting as he had done. It was possible, even probable, that Mrs. Crowley intended to annoy Laviolette, rather than to steal his ice, but there was no doubt that she did take the ice and carry it into her own premises. She knew it was not hers, for she had ordered no ice at the time, and had never ordered any such quantity as that. Laviolette had good ground, therefore, for his proceeding.

CROSS, J., thought the judgment of the magistrate in dismissing the case was perfectly correct, and he did not blame Mrs. Crowley. But all the probabilities were in favor of Laviolette supposing that his ice was intentionally taken. Consequently, the claim for damages could not be sustained.

MONK, J., said his first impression was that the judgment should be reversed, because Mrs. Crowley did not intend to steal the ice, but after consideration he came to the conclusion that Laviolette had cause of suspicion, and his Honor therefore concurred in the judgment dismissing the action.

Kerr & Carter for appellant.

Jetté, Beique & Choquet for respondent.

ARPIN, Appellant, and POULIN, Respondent.

Surety—Notes given to obtain Creditor's Assent to Composition.

Where a debtor settling with his creditors for 50c. secured, privately gave some of them unsecured notes for the balance to obtain their assent to the composition, *held*, that the endorser of the composition notes was freed from liability.

TESSIER, J. One Massé, an insolvent, made a composition with his creditors, and Dr. Poulin, the respondent, became surety for the payment of the composition notes, which he endorsed. It appears, however, that Arpin, a creditor, got other notes unsecured, from the insolvent, as a condition of signing the discharge. The insolvent had again become insolvent, and Poulin, having learned of the secret inducement to sign the composition deed, refused to pay one of the composition notes. He had got a subrogation of Massé's property, and he contended that his position as surety had been changed by the fraud. The judgment in Poulin's favor was correct and must be confirmed.

DORION, C. J., remarked that Poulin gave security on the faith of a deed of composition,

signed by Arpin, by which Arpin gave a discharge to Massé for the whole debt, providing he got 50c. secured. After that was signed Poulin endorsed the composition notes, and got a transfer of the stock from the debtor. On the same day Massé gave his own notes for the other 50c. in the dollar. Massé paid the first note which was not endorsed, and then he failed again. His position was affected by giving these notes, and there was an evident fraud on Poulin.

Judgment confirmed.

Jetté & Lacoste, for appellant.

Lacoste & Globensky, for respondent.

STEVENS, appellant, and PERKINS, Respondent.

Insolvency—Fraudulent Collusion.

Where a trader, before insolvency, went to England, taking with him a sum of his own money and a sum belonging to his wife, and purchased goods there in connection with his trade, (*held*, that in the absence of any account of the money so taken from his assets,) it must be assumed the purchase of goods was made with such funds.

DORION, C. J., said this appeal arose out of a *seizure-revendication* which the respondent had taken as assignee to recover 21 cases of leather belting as belonging to the insolvent estate of Campbell. The appellant, wife of Campbell, intervened, claiming the goods as her property, as having been purchased with her money. The respondent alleged fraud, and the Court below maintained that the whole transaction was a fraudulent one, and that the assignee, Perkins, was entitled to recover possession of the goods. Campbell, who was doing a large business here, had correspondents in England of the name of MacDonald and Hutchinson. They got into difficulties which involved Campbell, and the latter went to England to try to settle them. He took with him \$30,000 of his own money, and \$15,000 of his wife's. In England he had to redeem goods to the amount of £600 which his correspondents had pledged. He paid the £600 and got a bill of sale in the name of his wife from Hutchinson & McDonald, and sent the goods back to Montreal where they were placed in the custody of Nelson Davis, a warehouseman of this city. There was evidence that Campbell had a power of attorney from his wife. It was said the \$15,000 was given to him by his wife to invest in England, and that this was one of the modes of investment adopted by Campbell. He did not, however,

bring back his own money that he took to England, nor had he accounted for it. He put his wife's money instead of his own into this investment of belting. It seemed strange that Mrs. Campbell should purchase in England goods which had been exported from Canada, and which might much more cheaply have been purchased here, and then bring them back here, paying duty on them. His Honor thought the Court below judged rightly in saying that Campbell, in purchasing these goods in England, purchased them with his own money. If Campbell had brought back or accounted for the \$30,000, the Court might have been disposed to accept the view that he used his wife's money for the purchase of these goods. But he had not done so, and on his return he became insolvent. The judgment declaring the seizure good must be confirmed.

Gilman & Holton, for Appellant.

Geoffrion, Rinfret & Archambault, for Respondent.

SUPERIOR COURT.

Montreal, June 12, 1878.

PAPINEAU, J.

Ex parte MALHIOT et al., Petitioners, and BOURBOURN, Expropriated.

Practice—Taxation of costs—Quebec Railway Act, 1869, s. 9, ss. 10.

Held, that the taxation of a bill of costs by a Judge in Chambers, under the authority of the the Quebec Railway Act, 1869, s. 9, ss. 10, is not subject to revision by another Judge sitting in banc.

PAPINEAU, J., referring to the terms of the Act above cited, remarked that it gives power to a Judge to tax the bill of costs without giving the Court power to revise it. The common law gives no power to revise the judgments of another Judge, except in the cases mentioned in the code of Civil Procedure, which did not include the present case.

DeBellefeuille & Turgeon, for Petitioners.

Joseph & Burroughs, for party expropriated.

DISPUTED QUESTIONS OF CRIMINAL LAW.

I. Basis of Punishability.

II. Obscene Indictments.

III. Uncommunicated Threats.

IV. Defendants as Witnesses for themselves.

I. Basis of Punishability.—President Woolsey, in his late admirable work on Political Science,

devotes a chapter to the examination of the various theories of the punitive power of the State. The question is one of such great importance to the lawyer, underlying as it does our criminal jurisprudence, that it will not be out of place in these columns to give a sketch of President Woolsey's exposition. Until we know what is our object in punishing, we can neither give a just adaptation to our sentences nor a philosophic construction to our jurisprudence.

President Woolsey begins by pointing out the distinction between Punishment and Redress, the one being called for as something due to the State, the other as something due to the Individual. "There are various wrong acts," he proceeds to say, "which excite no apprehension in society that the interests of the whole are in jeopardy, such as are breaches of contract, and many wrongs done in the way of business. On the other hand, there are wrongs done to society which do not affect any individual in particular. These arise in importance from petty disorder, which a single policeman can control, through all the grades of evil, to high treason, or the attempt to destroy the very existence of the State."

He proceeds to notice the variety of views entertained as to what he calls the "incidence" of forbidden actions—that is, "whether in particular cases they affect individuals only, or a community and individuals, or a community only." In imperfect states, he reminds us, homicide has been considered mainly in the light of an injury to individuals; and even among comparatively civilized communities (e. g., Greece and Rome) theft was treated primarily as a breach of obligation. To this it might be added that even at the present moment the states in the North American Union differ as to how far embezzlement by trustees is a criminal offence punishable by the state, and how far it is to be regarded simply as a tort, to be prosecuted exclusively by the parties injured, in a civil court. Within the last few months we have witnessed in Massachusetts the failure, from want of due statutory provision, of a criminal prosecution against a defaulting trustee, under circumstances which, in New York or Pennsylvania, would have ensured a conviction. And in England, until recently, while the smallest larcenies were punished

capitally, the most scandalous embezzlements were regarded as out of the line of penal prosecution. And, as it is one of the incidents of embezzlement that the embezzled property should be secreted, this laxity enabled embezzlements to be carried on with comparative impunity.

We have next brought before us the important distinction between punishment and chastisement. "Correction," in its origin, is the act of "making completely straight, of bringing into a condition of rectitude;" chastisement is the act "of making the subject morally pure or innocent." These are acts of education, to be applied by a parent to a child, by a teacher to a pupil, by the head of a house of refuge or reformatory institution for children to his wards. Very different is the punitive function of the State. The reasons for the exercise of this function President Woolsey thus states:

"The principal reasons for the State's being invested with this power, that have been brought forward, are the following:

"1. That, by visiting the transgressor with some deprivation of something desirable, the State brings him to reflection and makes him better. The main end is *correction*.

"2. That it is *necessary for the State's own existence* to punish, in order to strike its subjects with awe, and deter them from evil-doing.

"3. That to do this is *necessary for the security and protection of the members of the State*. These two reasons are, in principle, one and the same.

"4. That the penalty is an *expiation* for the crime.

"5. That the State receives a *satisfaction*, by penalty, from the wrong-doer, or is *put in as good a situation as before*.

"6. That in punishment the State renders to evil-doers their *deserts*.

"The theory that correction is the main end of punishment will not bear examination. In the first place, the State is not mainly a humane institution; to administer justice and protect the society are more obvious and much higher ends, and the corrective power of State punishments has hardly been noticed by legislators, until quite modern times, as a thing of prime importance. In the second place, the theory makes no distinction between crimes.

If a murderer is apparently reformed in a week, the ends of detention in a reformatory home are accomplished, and he should be set free while the petty offender against order and property must stay for months or years in the moral hospital, till the inoculation of good principles become manifest. And, again, What if an offender should prove incurable? Should he not be set at large, as being beyond the influences of the place? Still further, What kind of correction is to be aimed at? Is it such as will ensure society against his repeating the crime? In that case it is society, and not the person himself, who is to be benefited by the corrective process. Or, must a thorough cure, a recovery from selfishness and covetousness, an awakening of the highest principle of the soul, be aimed at—an established church, in short, be set up in the house of detention?

"2. The explanation that the State *protects its own existence* by striking its subjects with awe and deterring them from evil-doing doing through punishment is met by admitting that, while this effect is real and important, it is not as yet made out that the State has a right to do this. Crime and desert of punishment must be presupposed before the moral sense can be satisfied with the infliction of evil. And the measure of the amount of punishment, supplied by the public good for the time, is most fluctuating and tyrannical; moreover, mere awe, unaccompanied by an awakening of the sense of justice, is as much a source of hatred as a motive to obedience.

"3. The same objection lies against the reason for punishment—that it is needed *to protect the innocent inhabitants of a country* by the terrors which penal law presents to evil-doers. The end is important, but certainly great wrong may be done in attempting to reach it. The enquiry still remains, "Why, for this end, should pain or loss be visited on an evil-doer?" Vol. I, pp. 330, 331.

The next theory noticed is that of expiation. Punishment is "to be regarded as an expiation of the crime, made in order that divine wrath or punitive justice may not fall on society. The solidarity of a nation involves the whole in the guilt of an individual member, and it is necessary by an expression of common feeling, which shows that the body does not sympathize with the sinful member, to clear itself of defile-

ment, to save itself from being obnoxious to vengeance, or from evil viewed as the result of divine displeasure." Scriptural and classic authorities are cited sustaining this view; but, while it is admitted by President Woolsey that "these antique expressions of the moral sense, common to men, connect human and divine law together," he maintains that "no especially new rational basis of punishment is disclosed by them." * * * "One may say that the State, according to the conceptions of ancient times, was involved in the guilt of crimes committed on its soil—as, indeed, it often is in fact; but the rites expiatory of guilt simply imply a desert of the punishment, which the State derives from the criminal."

Another theory that is noticed only to be swept away as incomplete is that of satisfaction. "Satisfaction may mean fulfilling the desire of a person, or making him a compensation equivalent to a debt or wrong. In the first or more subjective sense it is fluctuating, and no explanation of the ground of punishing can be derived from the fact of its satisfying a spirit of vengeance or of wrath. Still less is there any measure to be derived, even from the nobler moral sentiments, to determine the proper wages of evil-doing—how much suffering ought to be a satisfaction for a certain kind or degree of crime. In the other sense—the objective one—there may be important truth couched under the expression of paying a debt of justice to the State, of satisfying the claims that the State has against the transgressor; or under the expression that the penalty suffered for crime has put the State in as good condition as it was before."

The true theory on which punishment by the State can be rested is then stated by President Woolsey, as follows: "The theory that in punishing an evil-doer the State renders to him his deserts, is the only one that seems to have a solid foundation. It assumes that moral evil has been committed by disobedience to rightful commands; that, according to a propriety which commends itself to our moral nature, it is fit and right that evil, physical or mental, suffering or shame, should be incurred by the wrong-doer; and that, in all forms of government over moral beings, there ought to be a power able to decide how much evil ought to follow special kinds and instances of trans-

gression. Or, in other words, the State has the same power and right to punish as God has; it is, in fact, as St. Paul calls it, 'a minister of God to execute wrath upon him that doeth evil.' But it takes this office of a vicegerent of God only within a very limited sphere, and for special ends. It looks only at the outward manifestations of evil; it has no power to weigh the absolute criminality of actions; and, if it could measure guilt in purpose or thought with accuracy, this would not justify its going beyond positive acts hurtful to society; because, even in God's administration, this is not a world of retribution. Its province is confined to such actions as do harm to the State, or to interests which the State exists to protect. As the head of the family has a chastising power only within his family, so the State is not called upon—is even forbidden—to exercise a general moral government over the world. I would not say that, within these limits of actions not simply wrong, but hurtful to the State's interests, it is always bound by duty to God to punish, but only that it is permitted to punish. There is nothing wrong, but something right, in its sanctions, judgments, and inflictions. It is presupposed that punishment is put into its hands, and may be rightfully administered; but its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suffering, but to punish—punishment being, in the circumstances, otherwise right—not directly for the ends of God's moral government, but for ends lying within, and far within, that sphere. It is, in fact, very restricted in its sphere. It punishes acts, not thoughts; intentions appearing in acts, not feelings; it punishes persons within a certain territory, over which it has the jurisdiction, and, perhaps, its subjects who do wrong elsewhere, but none else; it punishes acts hurtful to its own existence and to the community of its subjects; it punishes not according to an exact scale of deserts, for it cannot, without a revelation, find out what the deserts of individuals are, nor what is the relative guilt of different actions of different persons." Pages 334, 335.

It is remarkable, in view of the importance of the question before us in the moulding and in the application of criminal law, that it has

received such slight attention from English and American jurists. Beccaria—whose treatise on Crimes was translated early in the present century, and who held that as the State rests on social contract it has the right to punish only so far as it has power given to it by such contract—took the ground that the object of punishment was simply preventive and deterrent; and what Beccaria taught, it was natural that those who agreed with him in principle, and who were fascinated by the purity and dignity of his style, should adopt as if it were unquestionable. Bentham, though from another stand-point, came to substantially the same results. General prevention, he argued, in his "Rationale of Punishment," ought to be the chief end of punishment. General prevention he distinguished from particular prevention in this: that particular prevention has respect to the cause of the mischief and general prevention to the whole community. His system is, therefore, virtually the terroristic theory of Fenerbach, which will be presently discussed; with this qualification—that pleasure, as well as pain, are to be used by the law-giver as inducements to avoidance of criminal acts. To this, as we will soon see more fully, applies with great force President Woolsey's criticism, that the preventive theory, "by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering."

Mr. Livingston repeatedly gives his adhesion to the Preventive, or Terroristic, theory. "We have established it as a maxim," he tells us in his report on the Penal Code (Livingston's Works, 1873, i. 26), that the object of punishment "is to prevent the commission of crime;" and, again (*Ibid* 31), "no punishments greater than are necessary to effect this work of prevention ought to be inflicted, and that those which produce it by uniting reformation with example are the best adapted to the end." Subsequently, however, (*Ibid* 83), he quotes with approval the preamble to the statute of the Legislature of Louisiana establishing the Code. This preamble contains, *inter alia*, the following:

"The only object of punishment is to prevent

the commission of offences; it should be calculated to operate—

"First, as to the delinquent, so as by seclusion to deprive him of the present means, and by habits of industry and temperance, of any future desire, to repeat the offence.

"Secondly, on the rest of the community, so as to deter them, by the example, from a like contravention of the laws."

By Dr. Paley, in his Moral Philosophy, we are told that "the end of punishment is twofold—amendment and example." The same view is adopted by the great body of English commentators, with, perhaps, but two exceptions: Lord Auckland (Mr. Eden), in his Principles of Penal Law, chapter 2, vigorously maintains the absolute theory, as hereafter noticed, and Mr. Lorrimer, in his Institutes, page 346, rejects the Reformatory theory as inadequate and delusive. Mr. Austin and Sir W. Hamilton, as we will see, follow the modified scheme of Kant, to be presently noticed.

When we examine analytically the theories of Punishment which President Woolsey presents with such masterly power, we find that they fall into two general classes: first, the Absolute, based on the principle *punitur quia peccatum est*; and, secondly, the Relative, under which we may generally notice (1) the Reformatory, or that which aims at the reformation of the person inculcated; (2) the Preventive, or Terroristic, or that which aims at the frightening him, as well as the community generally, from the commission of crime; and (3) the Exemplary, or that which uses the particular trial as a means of public instruction.

As the Reformatory theory of punishment has recently been revived by leading humanitarian philosophers, it may call for a few observations which are rather an amplification of, than an addition to, the refutation which has been given by President Woolsey.

The first enquiry we may make, in meeting the theory that reformation is to be the reason and limit of penal justice, is, What right have we to reform a man by removing him from his business and putting him in a prison, unless he be guilty of a crime which requires a specific punishment? Would imprisonment be likely to reform me if I thought it undeserved and unjust, and if it were imposed without a due conviction of guilt?

The next enquiry is as to the constitutional power of a state to reform its citizens by force. In answering this question we may waive the provisions in our state as well as Federal constitutions limiting convictions of crime to cases where bills have been lawfully found by grand juries, and where the offender has the right to meet before the petit jury the witnesses against him, face to face. Aside from these restrictions, what power has a constitutional state to attempt to forcibly re-form its adult citizens, unless as a mere subsidiary incident to penal justice? What power has it to make penal justice subordinate and auxiliary to ethics? Governments there have undoubtedly been which—some times on the paternal theory, sometimes because they were distrustful of the ordinary processes of law—have undertaken ethical reformation; but such governments have never been called constitutional. A prominent Russian officer, for instance, may require, in the opinion of his superiors, "reformation," and he may be sent to Siberia, or imprisoned in a fortress, in order to develop his better, and repress his worse, qualities. A group of leading French politicians may be banished or imprisoned as an incident to a *coup d'état*, in order to "reform" their political views. A vigilance committee may undertake to "reform" an obnoxious citizen by maltreating his person or destroying his property. We can conceive of such things in conditions of despotism or of anarchy; but we cannot conceive how, in a constitutional State, of which it is one of the fundamental sanctions that nothing is to be done by the government that can be properly executed by the voluntary moral power of the community, the reformation of individuals should be attempted by force. Houses of refuge and other asylums, as well as schools for children, we rightfully have. But it is beyond the scope of a constitutional government to open compulsory houses of reform for adults, or to make moral reform by force a primary function of State.

Supposing, however, we should hold that it is within the province of the State, the next question that would arise, in view of the fact that there must be discrimination, is, What persons are we to attempt to reform? To say, "those convicted of crime," is no answer, because this takes us back to the absolute theory that a person is to be punished because he is

guilty, whereas the theory before us is that a person is to be punished because he is to be reformed. In a general sense, as all men are susceptible of reformation, all men, in this view, are to be punished. As this cannot be, we must, as has just been said, make a discrimination; and the interesting question for the advocates of the Reformatory theory remains as to where the line is to be drawn. Now, in view of the fact that it is dogma after all that is the fountain of action, are not those who hold what we conceive to be pernicious dogmas the proper persons to be punished? If they should be reformed, would not the reformation of those who are influenced by them follow? Why should not the State, therefore, undertake the reformation, by means of fine, imprisonment, and the whipping-post, of those teaching pernicious opinions? We have examples enough of this in old times; and, supposing that this mode of education proved effective—admitting for a moment that history shows us that heretics and other unsound teachers are really to be reformed in this way—why not revive the same machinery? Here, for instance, is a bold political swaggerer teaching what we, on the eastern sea-board, hold to be highly immoral principles of inflation; why not catch him, if he happen to be travelling among us, and put him in the stocks? and, if this does not reform him, why not apply severer treatment? Or an eastern hard money man, crammed with Adam Smith and Ricardo, is travelling in the West, promulgating from time to time doctrines whose tendency is to impoverish the community by the shrinkage of its currency; why not arrest him and subject him also to reformation?

Another interesting question will arise as to the distribution of punishment, if susceptibility to reform, and not guilt, is to be the test. Indeed, the only proper course, if we are to formulate the proceeding under such a system, would be to collect a number of persons, proper subjects for reformation, in the court-house, and then, without regard to the crimes of which they are suspected, call testimony to determine what degree of punishment would be necessary to a reformation in each particular case. A person, for instance, of extreme sensitiveness to discipline might be reformed by imprisonment of two or three weeks, if such imprisonment

were accompanied by the application of æsthetic influences, and by expressions of endearment calculated to awaken dormant affections. Another person, more callous, more defiant, or less gushing, might require years of severe treatment for his reformation. Now, it might happen, as has often been the case, that the sensitive and gushing defendant is a murderer; while one whose offence is limited to assault and battery, committed in defence of his rights, may be the obdurate and intractable person, who declines to be reformed at anything less than a long term of years. The consequence would be that the murderer would be let off after a few weeks' detention, solaced by music and painting, or whatever else was likely to develop his moral tone, while ten or twenty years might be a light punishment to him guilty of the assault and battery.

Another enquiry remains: What is to be done with the incorrigible offender? When the sole object of punishment is reformation, then, when there can be no reformation, there can be no punishment. The Pomeroy boy (now a full-grown man), who was convicted in Massachusetts some few years ago of at least one cruel murder, has been pronounced by competent specialists to be so desperate a case that no hope of his reformation could be indulged; and, if this be so, he should at once, on the reasoning now before us, be discharged. More than half of those on the trial lists of our criminal courts are marked as old convicts; and, by recent statutes in almost all our states, such old convicts, when reconvicted, are to have cumulative sentences, proportioned to the degree of their former conviction. Our penal system, therefore, goes on the hypothesis that the more incorrigible a man, by the record of his former convictions, appears to be, the longer should be his imprisonment when convicted. The theory we here contest is that the more incorrigible he is, the less he is to be punished. In other words, the criminal is to be punished severely for a first and comparatively light offence, and relieved in proportion to his obduracy and his persistency in crime.

After all, we have to fall back upon what has already been glanced at as the final and fatal objection to the Reformatory theory, and that is that it is not only immoral in principle in its ignoring ethical rule as the proper basis of

punishment, but that it is immoral in practice, increasing, instead of extirpating, crime. No man forcibly punished by the state, not because he is convicted of crime, but because the state conceives forcible punishment would be good for him, but must nourish a sullen resentment to the state which thus capriciously and arbitrarily maltreats him. He may become a hypocrite—he may pretend reformation—but it is very unlikely that any moral change could be effected in him by what he must consider an atrocious outrage. And, as to others, it is not likely that they will be deterred from crime by witnessing the infliction of punishments which are not the logical consequences of crime. When it is said, "crime is to meet with punishment because it is crime," this is a strong argument to avoid crime. But when punishment as a usual sequence is not assigned to crime, then crime will not be avoided for the purpose of avoiding punishment.

To the terroristic system, as held by Fenerbach, by Bentham, and by Livingston, the objections stated by President Woolsey are conclusive. According to this theory, men are to be scared from crime, and, hence, punishment is to be made shocking and ghastly. Terrorism treats the offender, not as a *person*, but as a *thing*; not as a responsible being entitled to have justice meted out to him according to his deserts, but as a lay figure on whom punishment is to be inflicted in such a way as to affect the sensibilities of others. Example to others is right enough, when incident to a just punishment; when it is inflicted as a primary object, it is in itself, not only cruel and wanton, but it stimulates crime by destroying respect for the justice and candor of the government. A feeling that punishment is a subterfuge, whose object is to frighten, will have no moral effect on those to frighten whom this punishment is applied.

In closing this very inadequate survey of the topics discussed by President Woolsey in his admirable chapter on punishment, it may not be out of place to notice the views maintained in this relation by two great German thinkers, whose influence on juridical philosophy it is impossible to ignore. According to Kant, whose views have been partially reproduced by Sir W. Hamilton and Mr. Austin, judicial punishment cannot be employed as a means to ob-

tain a collateral good, but can, and must, always be imposed on, and made commensurate to, a violation of law. A man, so he argues, is not to be treated as a thing—to be sacrificed to the policy of the State; from this he is protected by his inherent personality. He must be justly convicted of crime before the State can punish him for the public benefit. Penal law is a categorical imperative. Punishment is inflicted, not because it is useful, but because it is demanded by reason. Social benefit, he insists, is no ground for punishment; and he forcibly illustrates this by saying that even if society, by the consent of all its members, should be on the point of dissolution, a murderer sentenced to death should first be executed, and that this would be right. As a rule, he recommends retaliation; the like is to be met by the like. This, however, is not to be, literally carried out, as in the Mosaic system “an eye for an eye, a tooth for a tooth.” The principle of equality is to be substantially, not formally, applied. It has, however, been objected to Kant's theory that it contradicts his theory of government. In his view, law is the emanation of the united will of the people—following in this the social contract theory of Rousseau. The security of individuals by this view is the object of the State. It is difficult to reconcile with this the conception that the State inflicts punishment, not primarily for the sake of the individual, but primarily for the sake of justice. But however inconsistent in this respect Kant may be, his example shows that it is possible for the absolute theory of punishment to be held by an adherent of the social contract conception.

Of Hegel's exposition of the same topic, President Woolsey gives, I cannot but think, but a scant recognition: “Hegel's explanation of punishment,” he says (p. 347), “seems to start from looking on a wrong as a negation (*a nichtigkeit*). The force used in a wrong is abolished by a counter-force—i. e., by a superior power of the State. Punishment is a “*Zweiter Zwang der ein Aufhebung ein ersten Zwang ist.*” Phil. des Recht, sec. 93. How crimes are to be punished, ‘thought’ cannot determine, he says, but positive determinations (i. e., of experience) are necessary to this end. With the advance of cultivation milder views of crime have come in, and now punishments have lost much of

their ancient severity.” A much fuller analysis of Hegel's philosophy in this relation, however, is found in the 9th edition of Berner's “*Lehrbuch des Deutschen Strafrechtes*,” Leipzig, 1877, a work which is at once the most popular and the most authoritative of recent German treatises on criminal law, and which adopts as its basis the Hegelian philosophy in this relation.

Punishment, according to Hegel (so writes Berner, sec. 21), is to be regarded as an agency to annihilate wrong in its effort to annihilate right. It is, therefore, the negation of a negation. This is tantamount to saying that punishment is retribution (*Vergeltung*).

But the punitive negation must be so applied as to do no more than cancel the prior criminal negation. The punishment must find its measure in the crime. As the right that has been impaired has a specific scope and quality, so the punishment, to be a correspondent negation, must on its side have its quantitative and qualitative limitations.

The identity of crime and punishment, however, which is thus required, does not consist in a specific similarity. It is not requisite that the crime should be retaliated on the criminal. All that is asked is that the evil of the punishment should be proportioned in value (*nach dem Werthe*) to the evil of the crime.

It is not the mission of philosophy, so continues Hegel, to establish a valuation of punishment so as to apportion it duly to each particular crime. Philosophy deals with the principle, and leaves the application to the practical reason. All that philosophy can do is to assign a qualitative and quantitative certainty to an impaired right, to which its punishment is to correspond. Hegel, *Rechtsphilosophie*, 390, egg.

Hegel's views may in this respect be criticised as speculative, but it must be remembered that they have been accepted and elaborated as the basis of penal law by some of the most practical of contemporary jurists. Bismarck is no idealist, yet we find Bismarck, in a speech in the Prussian Herrenhouse, in 1872, adopting the Hegelian theory of punishment, and illustrating it by the famous maxim which Meyer has taken as the motto of his late valuable treatise on criminal law: “Laws are like medicines; they are usually nothing more than the healing of one disease by another disease.”

less, and more transient, than the first. Certainly Hegelianism, in adopting and sustaining philosophically the theory of a just retribution as the sole primary basis of punishment, exhibits a healthy contrast to the sentimentalism of humanitarian philosophers who ignore the moral and retributive element in punishment, making its primary object to be the reform of the alleged criminal, and example to the community. To such theorists the final answer is that, until a man is proved to be guilty of a crime, we have no right either forcibly to reform him or to punish him as an example to others; and that neither reformation nor example will be promoted by assigning to him, after he is convicted, a punishment disproportioned to his offence. At the same time, in the application of such punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be so applied as to make the punishment conduce as far as possible to the moral education of both criminal and community.

CURRENT EVENTS.

ENGLAND.

LAW LEGISLATION IN ENGLAND.—In a communication addressed to the *Albany Law Journal*, the following notice occurs of proposed legislation in England:—"On Tuesday night Sir John Holker, the Attorney-General, introduced in the House of Commons, his 'bill for modifying and amending the law relating to indictable offences,' otherwise known as the Criminal Code. The bill has been drawn up mainly by Sir James Stephen. The Attorney-General explained its provisions at some length, dwelling chiefly on the alterations it proposes to make in the law. It abolishes the distinction between felony and misdemeanor, and substitutes for them the term 'indictable offence.' Accessories before the fact are done away with, and accessories and criminals are dealt with on the same footing. There is a large diminution in the number of *maximum* punishments, with a provision against accumulated penalties of hard labour. The term 'malice' is entirely omitted from the law, constructive murder is done away with, and a more

reasonable and intelligible definition of provocation is introduced. The definitions of larceny and theft are greatly simplified by sweeping away the present refinements, and the law of forgery is placed on a more definite and consistent footing. This part of the bill will supersede dozens of text-books, scores of acts of Parliament, and piles of legal decisions. The second part of the bill refers to procedure, and among the principal alterations under this head are the entire abolition of the subtleties of the law of *venue*; securities that ample notice shall be given to an accused person when proceedings are taken by indictment in the first instance; and provisions not only for changing the place of trial, but for conducting trials on the model of civil instead of criminal procedure. Right of appeal and power to grant new trials in criminal cases are given under certain conditions, and an improvement in criminal pleading is proposed which will sweep away the present system of verbose and technical indictments. Though the bill has been launched under government patronage, it is improbable that it will become law this year. On the motion of Mr. Osborne Morgan, a select committee of the House of Commons has been appointed to enquire what steps ought to be taken for simplifying the title and facilitating the transfer of land. In submitting this motion, Mr. Morgan called attention to the recent frauds of Dimsdale and others, and showed that they would have been prevented by even the rudest form of registration. He pointed out that each measure heretofore adopted with this view had failed from some defect in drafting, and said that as it was necessary to start afresh on entirely new lines, he would recommend a registration of deeds, a cadastral survey for purposes of identification and power of sale for every acre of land in the country, however held, and a registry of sales."

CONTRIBUTORY NEGLIGENCE.—In the case of *Clark v. Chambers*, 38 L. T. Rep. (N.S.) 454, decided by the Queen's Bench Division of the English High Court of Justice, on the 15th of April last, the defendant had placed in a private road adjoining his ground a hurdle with a *chevaux de frise* on the top, in order to prevent the public from looking over the barrier at athletic sports on his ground. Some one not known removed the hurdle to another spot

without the defendant's authority, and the plaintiff, passing of right along the road soon afterward in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the *chevaux de frise* and lost his sight. The jury, in an action against defendant for the injury, found that the original erection of the hurdle was unauthorized and wrongful; that the *chevaux de frise* was dangerous to the safety of persons using the road, and that there was no contributory negligence, and gave plaintiff a substantial verdict. The Court held that plaintiff's injury was not an improbable consequence of defendant's act; that it was the defendant's duty to take all necessary precautions under the circumstances to protect persons exercising their right of way, and that the action was maintainable. The case is one of that class represented by the well-known squib case of *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bl. 892, where defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self-defence, took it up and threw it across the market house. It fell upon another standing, the owner of which, also in self-defence, threw it off, when it struck plaintiff, and exploded and put out his eye, and defendant was held liable. In *Dixon v. Bell*, 5 M. & S. 198, the defendant, having left a loaded gun with another, sent a girl to get it, with directions to the other to draw the priming, which the latter attempted to do, and, as he thought, did. The girl, supposing the priming was withdrawn, pointed the gun at plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child, and defendant was held liable for the injury. See, also, *Nott v. Wilkes*, 3 B. & A. 304; *Jordan v. Crump*, 8 M. & W. 782; *Illidge v. Goodwin*, 5 C. & P. 190. In the latter case the defendant's horse and cart were left standing in the street, without any one to attend them. A person passing along whipped the horse, causing it to back the cart against plaintiff's window. Also, *Lynch v. Nurdin*, L. R., 1 Q. B. 29; *Daniels v. Potter*, 4 C. & P. 262; *Hughes v. Macfie*, 2 H. & C. 744; *Bird v. Holbrook*, 4 Bing. 628; *Harrison v. Gt. North Ry. Co.*, 3 H. & C. 231. See, also, *McCahill v. Kipp*, 2 E. D. Smith, 413; *Powell v. Deveney*, 3 Cus. 300; *Peck v. McNeal*, 3 McLean, 22.

IRELAND.

In the case of *Ex parte Singer Sewing Machine Co., re Blackwell*, 12 Ir. L. T. Rep. 57, decided recently by the Irish Court of Bankruptcy, a sewing machine contract question came up. A sewing machine was let on hire to a trader by the company mentioned, on an agreement that the trader should pay a certain monthly rent, and keep the machine in his own custody; and that, if he should fail to perform on his part, the machine might be taken by the company, which might also recover the amount of rent in arrear. He had an option to purchase the machine within a year, when the payments of rent were to apply toward the purchase-money. He paid rent for two months, and then did not pay for nine months, when he became bankrupt. The company claimed the machine from the assignee in bankruptcy, and asked to be permitted to prove for the balance of rent due. The matter was referred to a jury to determine whether there was a custom or usage in Ireland, allowing such contracts of sale as this one, where the title to the property was to remain in the vendor after he had parted with possession. The jury found that there was such a custom. The Court held that the custom was not an unreasonable one, and thus the company was entitled to resume possession of the machine, and this notwithstanding its laches in allowing the instalments of rent to remain so long overdue. The Court, however, expressed its disinclination to favor such contracts by refusing to grant the successful party any costs. The *Irish Law Times*, in an article upon the decision, gives instances where the Irish courts have condemned these contracts as "entirely at variance with all principles of fair trading." (*Mackintosh v. Kerwan*, Q. B. Div., Feb. 4, 1878; *ex parte Harpus, re Smith*, 9 Ir. L. T. Rep. 52).

FRANCE.

SOCIETY OF COMPARATIVE LEGISLATION.—The Society of Comparative Legislation at Paris takes advantage of the international exhibition held in that city this year to endeavor, in an informal way, to bring together lawyers from various countries, who may be visiting the exhibition, by throwing open its meetings to all foreign jurists who desire to attend. The society is made up of the leading

members of the bench and bar of France, and those interested in international law who attend its meetings are certain to be entertained and instructed. The topics of discussion for these meetings, as announced by the society, are: (1) Bills of exchange; (2) Maritime insurance; (3) What authority should a judgment delivered in one State be allowed, in another, and under what conditions; (4) The conditions and effects of extradition; (5) To what extent ought foreigners to be admitted to share in the private law of the State in which they are commorant; (6) In what cases should crimes or delicts which have been committed be cognizable by the courts of the State of which the authors are subjects. The rooms of the society are in the "Hotel de la Société d'Encouragement," 44 Rue de Rennes.

UNITED STATES.

THE REPEAL OF THE BANKRUPT LAW.—The House of Representatives has concurred in the Senate Amendment to the bill for the repeal of the bankrupt law, the President has signed the bill and it is certain that the law will pass out of existence on the 1st September next. The *Albany Law Journal* says: "This is a result for which the greater portion of the people of the country have been anxious for the past eight years, but the friends of the law, though weak numerically, have wielded sufficient influence to prevent a compliance, by the National Legislature, with the wishes of the majority. It was at one time doubtful whether the present Congress would not follow the example of its predecessors, and fail to pass the bill, notwithstanding a very large majority in each house were in favor of it. But the friends of the bill have been active, and it has not failed. The postponement of the time when the act is to go into effect was a concession to a claim which was made by the friends of the existing law, that if it was repealed without notice, a very great number of unfortunate individuals, who were intending to take the benefit of the law, would be disappointed and ruined. Three months' time will enable all who have any claim to favor in this matter to take such action as they desire, and we anticipate that the bankrupt courts will do more business during that period than they have ever done in the same time."

"We imagine that the repeal of this law will be of considerable benefit to those of the profession engaged in general practice. The incoming of the bankrupt law nearly destroyed the collection business; a debtor that could be made to pay only by means of legal process being as a rule on the verge of bankruptcy, and a suit against him liable to be defeated by bankrupt proceedings. Then the law made certain acts, such as the non-payment of negotiable paper, acts of bankruptcy, and debtors were compelled to pay in cases where they would have resisted under other circumstances. In these two ways the statute discouraged litigation, and it was also injurious to the profession for the reason that the fees and expenses of bankruptcy proceedings were paid out of funds which, under the pre-existing laws, would have very generally been spent in litigation. But the profession will not alone receive advantage from repeal. Vigilant creditors will derive advantage from their vigilance, and distinction can be made by the insolvent between debts of different degrees of merit. In fact we think every one, debtor and creditor alike, will be benefited by the repeal."

ASSAULTS ON JUDGES.—The precedent which has been set in the English courts of assaulting judges, has been followed in the New York Court of Common Pleas, a lunatic, by the name of Chalmers, having, on the 7th instant, made an assault in open court on Mr. Justice Daly who was presiding at a trial there. The assailant, who had an hallucination that the police commissioners of New York were annoying him in various ways, had prepared a petition asking for their arrest, and had presented it to numerous judges and courts, the usual result being his ejection from the court rooms into which he had intruded. On the day mentioned he began to read the petition to Justice Daly, who at first kindly attended to his reading, but discovering the nature of the document requested him to desist, and upon his refusal to do so, directed his removal from the court. Thereupon, the petitioner, folding up the papers he had in his hand, forcibly hurled them at the head of Judge Daly, saying, as he did so, "You are like all the other judges, a liar and a trickster." Of course the belligerent suitor was immediately arrested, and he was subsequently committed by a police magistrate as a lunatic. The petition itself, parts of which were published in the daily press, indicates clearly that the assailant was insane.—*Albany Law Journal*.

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No. 26

THE ENQUETE SYSTEM.

We have been informed that the use of stenography for the purpose of taking evidence in the Courts has not in every instance proved satisfactory to those who have resorted to it. The inconveniences to which our attention has been directed, and which have reference particularly to Montreal, consist chiefly in the difficulty of checking errors in the notes taken by the stenographers. As counsel cannot at the time read or supervise what is taken down, mistakes, it is said, may occur in the notes and may pass undetected until too late for rectification. Apart from inaccuracies which may occur in the original notes, there may also be mistakes in the transcription, and the original notes are not filed, and even if accessible, would not be legible to other short-hand writers. It is also remarked that writers are of varying degrees of accuracy, and some are far from prompt in extending their notes for use in the case.

If the system of stenography has not done all that its enthusiastic admirers anticipated, there is no occasion for surprise, for we are inclined to think that the expectations entertained at the outset were in some respects unreasonable. Stenography is simply rapid writing, and its use does not preclude errors arising from imperfectly hearing what is said, or misconceptions proceeding from imperfect acquaintance with the subject. In some of the discussions which preceded the introduction of stenography, it seemed to be supposed that because evidence could be taken down rapidly in short hand, therefore the words of the witness must necessarily be exactly photographed. But a moment's reflection is sufficient to show that entire accuracy cannot be guaranteed. The senses are imperfect, and a word or two may be incorrectly heard, whereby the meaning of the witness is misunderstood. How often, in the course of a trial, are counsel at war as to what a witness has actually said, and this within a few moments after the words have been uttered! It is no inconsiderable merit of stenography that in such cases a

reference to the short-hand notes is generally accepted as final.

The question is not whether stenography is absolutely perfect, but whether it is not an improvement upon the old time system. It will be admitted, we think, by all, that in certain classes of cases it is a vast benefit to have the aid of a stenographer, and few would willingly forego the advantage. That there are some imperfections in the system of stenography is quite true. There are imperfections in almost all human contrivances. But just as printing is a vast improvement over the old system of multiplying copies by hand, and printer's errors are few compared with the blunders which will be found in almost all written documents, so short hand in the Courts has proved of immense advantage. It must not be forgotten, too, that witnesses have an opportunity to correct their testimony when the notes are read over to them, and it is not to be assumed that a witness, especially if hostile, will permit a material deviation from what he said to pass unnoticed.

The whole subject is one of great practical importance, and on another occasion we may return to it. In the meantime it would be useful if those who have had large experience both under the old and new systems, would state the results of their observation, and point out wherein they conceive the present practice is defective.

A case involving a novel point of law was decided by the County Court of San Joaquin county on the 4th ult. A jury in a civil case while out deliberating was taken by the sheriff to a restaurant to eat. As the county had refused to pay for feeding juries in civil cases, the sheriff told the restaurant keeper to collect from the jurors. Of this, however, the jurors had no knowledge. One of the jurors refused to pay for his meal, and was sued by the restaurant keeper. No express promise to pay was proved. The court held that, under the circumstances of the case, the law would not imply a promise on the part of the defendant to pay for what he ate, and gave judgment in his favor.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, June 22, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER,
and CROSS, JJ.Cuvillier et al., Appellants; and Symes et al.,
Respondents.*Donation entre Vifs—Surrenance d'Enfants—Re-
vocation.*

An unmarried lady whose estate was equal to about a million dollars, made donations to relatives amounting to \$100,000, of which the interest was paid regularly until some years after her marriage. The donations were made before the coming into force of the Code of Lower Canada. One of the donations, of \$10,000, was in question in the cause. *Held*, Chief Justice Dorion and Mr. Justice Cross dissenting, that the donation was not revoked by the donor's marriage and the birth of children.

The question was whether a certain donation of \$10,000, being one among several amounting in all to \$100,000, made by the respondent to a relative before her marriage to the Marquis of Bassano, was revoked by her marriage and the birth of children, issue of the marriage. The Court below held that the donations were revoked, and dismissed the action brought against the Marquis de Bassano for overdue instalments of interest on the donation of \$10,000 which was particularly in question in the present suit.

DORION, C. J., dissenting, considered the judgment right and that it should be confirmed. Miss Symes had made these donations, amounting to about one-tenth of her fortune, several years before her marriage, in 1872, and the interest was paid until 1876, when she refused to continue the payments any longer, the ground being that the donations had been revoked by her marriage, and the birth of two children. According to the French law, if a donor gave the whole of his property or *aliquam partem*, the donation was liable to be revoked if he married subsequently. There was a variety of opinion among the authors on the subject, but the rule seemed to be that if the donor had given such a portion of his fortune as he would not have given if he had contemplated marriage and having children, the donation would be revoked by his marriage. But a trifling gift would not be revoked. Here the donations must all be considered together,

and it seemed improbable that if Miss Symes had contemplated the possibility of having children, she would have given so large a sum as \$100,000 to her relatives. There was no apparent motive for the act, for these relatives were not in need. At the time of her marriage, there was a clause put in the draft of marriage contract, proposing to ratify the donations, but the English solicitor, into whose hands the draft came, considered such a donation so extraordinary that he struck it out. This indicated the view of a professional man accustomed to deal with business of this kind. His Honor considered that the ordinance of 1731, which made such donations revocable by marriage, if not actually in force in Lower Canada, might be considered as adopting the jurisprudence which previously existed, or as deciding between conflicting jurisprudence. It was said that there was a ratification of the donation, by the respondent continuing to pay the interest after her marriage. But she had no knowledge of the law, and her husband was a foreigner who was unacquainted with it. And moreover, the donation being absolutely revoked and null, could not be ratified. Upon the whole, the Chief Justice considered that the action was properly dismissed.

CROSS, J., also dissenting, concurred with the Chief Justice.

RAMSAY, J., rendering the judgment of the majority, remarked that no such question could ever arise again. A very few months after this occurred the law was entirely changed, (C. C. art. 812), and donations are no longer subject to revocation by the birth of children to the donor. On the general principles of law which governed the case, he thought the Court was unanimous; the whole difference was as to the application of the law to the particular circumstances of the case before the Court. There was evidence that the respondent considered the donation a small one in view of her wealth. Circumstances which transpired subsequently could not be taken into consideration. The authorities, in his Honor's opinion, did not bear out the view that a donation of so inconsiderable a part of the donor's fortune was annulled by the birth of children.

TESSIER, J., concurring, considered that the donation of \$10,000, which was alone in question in the present case, must be considered

separately, and without reference to the others. The rule of Roman law relied upon, be held, was not in force in the Parlement de Paris.

MONK, J., concurred in the judgment of the majority for this reason. This was precisely one of those donations which, supposing the law revoking donations to be in force, would not have been set aside in France under the circumstances of the case, the donation constituting but a small portion of the lady's wealth, and her motives in making it being easily understood.

Judgment reversed.

E. Barnard, for Appellants.

Bethune & Bethune, for Respondents.

BULMER et al., appellants, and DUFRESNE et al., respondents.

Substitution—Sale of sand by the Grévé.

The *grévés de substitution* sold to the appellants all the sand they could take from the property for five years. Held, that the sale was illegal, and that the purchaser might be sued by the substitute for the value of the sand so taken. (21 L. C. J. p. 98.)

The action had been brought by the substitutes to a succession against the appellants to whom the *grévés de substitution* had sold all the sand they could take from the property for five years. The judgment had condemned the appellants to pay about \$800.

CHARRAS, J., dissenting, thought the judgment should be reversed.

RAMSAY, J., also dissenting, held in the first place that no such action was known to the law either of this country or of England. No trace of such a proceeding could be found in the books. On the merits there was no evidence to show the quantity of earth taken at all, except the admission of Bulmer, and the amount awarded was exorbitant.

DOMON, C. J., said that Dufresne, the *grévé*, long after the registration of the substitution, sold this sand to Bulmer, who must be taken to have knowledge of the substitution. The sale was beyond the powers of the *grévé*, as the removal of the sand might destroy the value of the property altogether. Bulmer, by removing the sand, stood in the same position as any one who caused damage to his neighbor—he was bound to repair the damage. He might not have had actual knowledge of the substitution, but it had been published and he was bound to

know it. The action resembled the action of trover in England. The judgment was correct in principle, but the amount must be modified to the extent of two-eighths, and the costs would be awarded in the same proportion.

H. W. Austin for appellants.

Geoffrion & Co. for respondents.

DISPUTED QUESTIONS OF CRIMINAL LAW.

(Continued from page 298.)

II. "Obscene" Indictments.—The ruling of the English Court of Appeal in *R. v. Bradlaugh*, 38 L. T. (N. S.) 118, will shake a practice which, in the American courts, has been heretofore unquestioned. The defendants, Charles Bradlaugh and Annie Besant, who argued their case in person, and with remarkable shrewdness and force, were convicted in the Court of Queen's Bench on an indictment which charged that they, "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and to bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did, print, publish, sell and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, etc." The jury found that the book was calculated to deprave public morals, but exonerated the defendant from all corrupt motive in publishing it.

A motion in arrest of judgment was made, on the ground that the libel ought to have been set out. The motion was overruled by the court, consisting at that time of Cockburn, C. J., and Mellor, J. The case was argued in error in January, 1878, before Bramwell, Brett, and Cotton, L. J., who unanimously concurred in reversing the decision of the Queen's Bench. Bramwell, L. J., who leads off, begins by announcing the general rule that an indictment, if it give simply a conclusion of law, is bad, but that it must set out the facts necessary to constitute the offence in the concrete. The

reasons for this rule he recapitulates, saying that, while there may no longer be much force in those which rest on the defendant's right to know the charge against him, and on the importance of an exact specification so as to relieve him from a second trial for the same offence, the third reason remains substantial, this reason being a defendant's right to have the question of his guilt determined on the record by a court of error. Wherever the court has to determine on the legal quality of words, he proceeds to argue the words must be set out. In civil pleading this must be the case; *a fortiori* in criminal. He cites *R. v. Curri*, 2 Stra. 789, 17 How. St. Tr. 154, as a case for obscene libel in which the words were set out, and *R. v. Sparling*, 1 Stra. 498, where it was held to be a fatal objection to an indictment for cursing, that the "curses" were not spread on the record. Chitty's Precedents, he admits, contain a form omitting the words of an alleged obscene libel (2 Chitty's Cr. Law, 45), "but," he remarks, "a solitary precedent in a text-book is of but little weight; you must have a mass of precedents before they can be used as authority." "The other authorities consist altogether of American cases. Now, cases decided by the American courts are not, strictly speaking, authority at all; they are only guides, though frequently most valuable guides; they contain the opinions of able men, well versed in our law, and, therefore, will always have great weight attached to them in our courts, but they are not authority by which we are in any way bound. But, even if they were binding on us, they do not assist the case of the prosecution in any way, but make quite in the opposite direction. For instance, the case of *The Commonwealth v. Tarbox*, 55 Mass. 66, has been relied on; but in that case there was an allegation in the indictment that the libel was so obscene it could not be put on the record, and it is clear that it was considered that, but for such an allegation, the words must have been set out. And the other American cases go no further to help the prosecution, but, as far as they go, equally aid the defendant's case. It is true that it is suggested in this case that, although there is no such specific allegation in the indictment, yet that one is implied in the epithets, "lewd, filthy, bawdy, and obscene," applied to the libel; but, as such epithets are employed in every indictment, they can imply nothing of the sort."

The judgment of the court below he thus disposes of:

"The lord chief justice gives three reasons for his decision. The first reason is the great inconvenience that might arise from such a rule. He gives an instance of "what would be the monstrous inconvenience of setting out *in extenso* the whole of a publication which may consist of two or three volumes." With great deference to his lordship's opinion, it seems to me equal inconvenience might arise from making such an exception to the general rule of law; for when is a libel to be considered too long to be set out? Is one of ten volumes too long, or two, or one; or one of one hundred pages? Where is the line to be drawn? And it has not been suggested that defamatory libel need not be set out; and yet it may be of any length. And however long a libel is, it is admitted that it must be set out, or, on demurrer at any rate, the indictment will be bad. Then his lordship says the objection ought to have been taken on demurrer. That might be so if the Legislature had said so, but it has not, and it is not the law of the land. The law says, convenient or inconvenient, he may take the objection at any time before or after verdict. His last ground is that it is *communis nocumentum*, and, therefore, after verdict need not have been set out; but I am not aware of any such exception being known to the law. Now, in the judgment delivered by Mellor, J., I find he says, "If it be essential to set forth the terms in which the libel was published, the point may still be taken upon error." I am glad to find those words, and glad also to see that the lord chief justice himself says that he leaves the ultimate decision of this matter to the court of error." I am glad to find those expressions, because they show that they did not consider they had concluded the whole question, but that it was deserving of being more fully discussed here. The result is that there are a number of authorities unimpeached and binding upon us, and, no good reason having been given us why we ought not to do so, we must act upon them. According to the law as contained in them, this indictment is wholly defective, and not merely imperfect, the words "to wit," with what follows them, not supplying the defect in any way, being mere words of identification. Therefore, without expressing any opinion on the merits, which it is not for us to do, and which we could

not do, being wholly in ignorance on the matter, we come to the decision on the dry point of law, that judgment ought to have been arrested, and the judgment of the Queen's Bench Division must be reversed."

Brett, L. J., who follows, argues at large to the effect that, wherever words are the gist of an offence, they must be set out in the indictment. Of the older cases he gives the following interesting analysis:

"In *Zenobio v. Axtell*, 6 Term Rep. 162, the libel was in French, but the indictment after saying that it was published in the French language, went on to say that it was "to the purport and effect following, in the English language—that is to say," and then followed a translation of the libel in English. It was held, on motion in arrest of judgment, that such a declaration was defective, Lord Kenyon remarking that "the plaintiff should have set out the original words and then have translated them." In *Wright v. Clements*, 3 Barn. & Ald. 503, the declaration alleged that the defendant published certain libellous matters of and concerning the plaintiff, "in substance, as follows: that is to say," and then set out the very words of the libel. On motion in arrest of judgment it was argued that from some such a preface to the setting out the libel, it must be concluded that the actual libel published was not set out *verbatim*, but in substance only; and the court allowed the objection, saying the libel ought to have been introduced by some such words as to the "tenor and effect following," which would have imported that the very libel itself had been set out; and judgment was accordingly arrested. *Cook v. Cox*, 3 Mau. & Sel. 110, is to the same effect. These cases were decided in 1814 and 1820, and, therefore, after Fox's Libel Act, 32 Geo. III., ch. 60, passed in 1792, which is a sufficient answer to the argument founded on that act. But it is quite clear that no alteration was, or was intended to be, made in the law in this respect by that act. This appears both from the principle of that enactment and also from express provision contained in it. After that act it was still left for the judge to say whether the words used could possibly be a libel, and, therefore, since before he can decide that question he must have the libel before him, the necessity for setting out the libel was not removed. But the act contains an express provision

to the same effect. By section 4 it is provided: "That, in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act; anything herein contained to the contrary notwithstanding." The last case that I shall refer to is a very remarkable one. In *Rex v. Wilkes*, 4 Burr. 2527, the defendant is indicted for having published an obscene and impious libel, "to the purport and effect following, to wit;" and then followed the libel. Before the trial the attorney-general, Sir Fletcher Norton, applied to Lord Mansfield, at chambers, to amend the indictment by striking out the above words, and substituting for them the words "to the tenor and effect following, to wit;" which his lordship, after hearing the other side against it, did. Now, here it is worthy to notice that although the actual libel was fully set out, yet the highest law officer of the crown thought it inexpedient and unsafe to go on without substituting technical prefatory words, which were always held to signify that the actual words of the libel followed them, for other words which had not the same technical significance. So, taking a review of all these cases, we find in them a strong body of authority derived from every kind of crime which consists in words, to the effect that in all such crimes the pleadings must set out the words themselves which constitute the offence. Now, what are the cases which are said to be to the contrary effect? In *Dugdale v. The Queen*, Dear. & P. 64, the indictment was for keeping in his possession indecent prints, and in a second count for obtaining and procuring indecent prints, in both cases with an intent to publish them. In neither case were the prints set out in the indictment, but it was not necessary, on such a charge, that they should be set out. The offence was complete, though the defendant should never have looked at them, and therefore it was not necessary to the validity of such an indictment that they should appear on the face of it. This case is, therefore, distinguishable on that ground but I think it would have been enough to say that there is a difference, in this respect, between indecent prints and pictures, and an offence consisting of words. *Sedley's Case*, 1 Keb. 629, *Fortes*, 99, is also distinguishable on the same

ground—that it was not a case of libel at all, but of indecent exposure. In *Regina v. Goldsmith*, 28 L. T. (N. S.) 881, Law Rep. 2 C. C. 74, the prisoner was indicted for unlawfully receiving goods knowing them to have been obtained by false pretences, he did not get them himself by false pretences. Now, on such a charge, it was necessary to prove that the prisoner knew what false pretence had been used in getting the goods, therefore it was not necessary to set out the actual false pretences in the indictment: just as, in an indictment for receiving goods knowing them to have been stolen, it is not necessary to show how or by whom they were stolen, since that offence can be committed by a man who is ignorant of the exact circumstances of the theft. *Heyman v. The Queen* was a case of conspiracy fraudulently to remove goods, in contemplation of bankruptcy, and, as in *Regina v. Aspinall*, which was also a case of conspiracy, the offence was held complete directly the agreement was come to; so that—after verdict, at least—an indictment which alleged such an agreement, but omitted other particulars, was good. In those cases the crime did not consist in words, but in an agreement for a particular purpose.”

Cotton, L. J., in concurring makes the following comments on the American cases:

“But do these American cases even justify such an omission as there is here? We should not be bound by them if they did, but they do not. They lay down a rule that, where there is an allegation that the libel is too bad to put on the record, it may be omitted; and it is enough to say that there is no such allegation here. But do the English courts recognize that rule? They do not. Our courts do not allow libels to be perpetuated and disseminated under a pretence of judicial necessity; but that is as far as they go. Where it is relevant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. A court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them. If it is desirable that there should be an exception in any such case, the Legislature must make it, as it has made exceptions in other cases.”

It is to be observed, as is noticed by Bramwell, J., that the American authorities excuse

the non-setting forth of the libel on the grounds of obscenity, which allegation was omitted in *R. v. Bradlaugh*. It will not do to say that this excuse is surplusage. An indictment which excuses the non-setting of a document on the ground of its loss, or of its destruction by the defendant, is good, though without such an excuse the indictment would be defective. The excuse, therefore, is essential. But, when such an excuse is made, the American cases present an almost unbroken line of authority to the effect that the obscene document need not be copied. *The Commonwealth v. Holmes*, 17 Mass. 335; *The State v. Brown*, 1 Williams (Vt.), 619; and *The People v. Girardin*, 1 Mann. (Mich.) 90, are direct to this effect. *The Commonwealth v. Tarbox*, 1 Cush. 66, reaffirms the principle of *The Commonwealth v. Holmes*, but holds that to paste the alleged obscene matter to the indictment is a defective mode of pleading. On the other hand, the *State v. Hanson*, 23 Texas, 234, an indictment for publishing an obscene document, without giving the words, was held bad. In this case, however, there was no excuse offered, as in *The Commonwealth v. Holmes*, for not setting out the libel. *The Commonwealth v. Sharpless*, 2 Serg. & R., was the case of an indecent picture, and the Supreme Court held that it was not necessary that the picture should be copied on the indictment. The reason, however, is the same as that given to *The Commonwealth v. Holmes*—that the court must preserve the “chastity” of its records, and not permit them to be used to perpetuate obscenities.

If an obscene publication were to be considered as exclusively a libel, it would be difficult to resist the conclusion that, as a libel, when indicted as such, it should be spread on the record, supposing that no legitimate excuse be given for the non-setting out. But there is much force in the position that an obscene publication is not so much a libel as an offence against public decency, and, if it be the latter, the particularity required in setting forth libels is not necessary. If a mob, for instance, should gather about a religious assembly, disturbing its worship by profane and indecent language, it would not be necessary, it may well be argued, that those profane and indecent words should be set out. Nor is this the only illustration to which we may appeal. An indictment against a

common scold need not set forth the words the "scold" was accustomed to use. *United States v. Royall*, 3 Cranch, 618; *The Commonwealth v. Pray*, 13 Pick. 362; *James v. The Commonwealth*, 12 Serg. & R. 220; and see to same effect 6 Mod. 311; 9 Stra. 1246; 2 Keb. 409. To such an indictment we can readily conceive the same objections to be made as were made against the indictment in *Bradlaugh's case*. "How do we, the Court of Appeals, know that the words the scold used were really scolding? Is it not possible that, while the jury may have thought they were, we might have thought differently? Is not language of gentle self-assertion on the part of women often called scolding? To convict under such an indictment violates the important rule that, when an offence consists in the use of words, those words should be spread out on the record." Yet convictions on indictments of this class have been numerous, both in England and the United States.

In a late North Carolina case the defendant was indicted for disturbing a place of public worship, by singing persistently a hymn to music out of tune. Could it be rightly maintained that the notes of such a tune should be given in the indictment, so that it could be sung before the Court of Error in order to satisfy them of the indecorum?

A common "barrator," to take another illustration, can be indicted without setting forth the particulars of which the barratry consists. *The State v. Dowers*, 45 N. H. 543; *The Commonwealth v. Davis*, 11 Pick. 432; see to same effect 6 Mod. 311; 2 Hale, 182; *Chitty's Cr. Law*, 230. Yet here, also, a court of error might complain, as did the judges in *Bradlaugh's case*, that they were asked to pass sentence on an indictment which gave only a conclusion of law, and did not state the facts on which this conclusion rested.

But these are not the only cases in which courts of error have been obliged to sustain indictments resting on summaries of documents or acts, instead of on documents or acts themselves. The loss of a document, or its retention by the opposing party, as we have just observed, has been frequently held to be a sufficient excuse for the omission to set it out. Yet in such case the Court of Error has to accept the finding of the jury as to the character of the document,

and are precluded from having recourse to the document to determine its legal character.

We must, therefore, conclude that the law does not require a document which is the basis of a prosecution to be set out in the indictment, when there is sufficient reason given in the indictment to excuse the omission. The question is, what is a sufficient reason?

It is plain that loss or possession by the defendant is such a reason.

Whether the excessive obscenity of the document is a reason is discussed at large, as we have just seen, by the judges of the Court of Appeals, and, although they have put their decision on the ground that there is no excuse for the omission given in the indictment in the case before them, yet their reasoning is clear to the effect that, no matter how obscene the litigated document may be, on the record it should be spread. This, then, is the issue between the English and the American Courts. As to this issue it is necessary only to remark that obscenity, like noxious sounds and smells, is a matter peculiarly for the determination of a jury. When there has been a finding by the jury, with the approval of the judge trying the case, it is no more necessary for the Court of Errors to have the obscenity reproduced before them than it is necessary that the noxious sounds and smells should be reproduced. And if a common scold's words, or if the words of a person disturbing a religious meeting, need not be set out, why need the words incident to the obscene nuisance, found to be such by a jury?

AGENCY—LIABILITY OF AGENT TO THIRD PARTIES—IN TORT.

For many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either by incorporating them or enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners.

"I can well understand," said Baron Bramwell, in *Ruck v. Williams*, 3 H. & N., 308, "if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if

one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but when commissioners, who are a *quasi*-corporate body, are not affected (i. e. personally) by the result of an action, inasmuch as they are authorized by act of Parliament to raise a fund for payment of damages, on what principle is it that if an individual member of the public suffers from an act *bona fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

Chief Justice Best pointed out in *Hall v. Smith*, 2 Bing., 156, that it is harsh and impolitic to cast on individuals gratuitously a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability. The basis of the above reasoning therefore fails, and *debile fundamentum fallit opus*: per Blackburn, J., in *Mersey Docks etc., v. Gibbs, sup.*

The case of the Postmaster-General is like that of all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and excise, the Auditors of the Exchequer, who are not liable for any negligence or misconduct of the inferior officers in their several departments: per Lord Mansfield in *Whitfield v. Lord Le Despencer*, Cowp., 754.

The reason assigned by Lord Holt (12 Mod., 489) for holding a principal liable for the acts of his deputy is that, as he, as principal, has power to put him in, so he has power to put him out. In general merchant ships the captains have a power of hiring their sailors, and so far are considered as independent of their owners; and the reason given by Molloy (b. 2, c. 13, s. 13) why the master of a ship is held responsible for the acts of the mariners within the scope of their authority, is that they are of his own choosing, and he may reimburse himself any injury they may have committed out of their wages. But the master is not liable for the wilful act of one of the crew: *Bowcher v. Nordstrom*, Taunt., 568.

There is no analogy between the case of a captain of a ship of war and that of a master of a ship. The former has no power of appoint-

ing the officers or crew on board; and is compellable to enter upon the performance of the duties upon the ship to which he is appointed. Hence he is not answerable for damage done by his vessel running down another vessel, the damage having been done during the watch of the lieutenant, and when the captain was not upon deck, nor called by his duty to be there: *Nicholson v. Mouncey and Symes*, 15 East, 384.

In all cases deputies are answerable for their own personal misfeasances; hence, a deputy postmaster is liable for non-delivery of letters gratis in a country post town: *Bowning v. Goodchild*, 2 W. Bl., 909.

Lane v. Cotton, 1 Ld. Raym., 646; *Whitfield v. Lord Le Despencer*, 2 Cowp., 754, the cases of the Postmaster General; and *Nicholson v. Mouncey*, 15 East, 384, the case of the captain of the man-of-war, are authorities that when a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the government was the principal, and the defendant merely a servant. All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish: per Blackburn, J., in the *Mersey Docks and Harbor Board v. Gibbs*, 35 L. J., 225, Ex.

As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry letters to the post office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own: per Lord Mansfield, *Whitfield v. Lord Le Despencer*, Cowp., 754.—*W. Evans*, in *London Law Times*.

CURRENT EVENTS.

INDIA.

A SINGULAR CRIMINAL CASE.—A criminal case has recently come before the courts of India which is exciting great interest in that country by reason of the position of the parties implicated. The Rajah of Poorree, who is the hereditary guardian of the temple of Juggernaut, and the secular head of the Hindoo religion in Oressa, and who is worshipped by vast numbers of people as the visible incarnation of Vishnu, became possessed with the idea that a Hindoo ascetic of great sanctity who enjoyed a special reputation for curing diseases was attempting to perform some work of incantation against him. He therefore induced the ascetic to visit his private apartments, and, with the aid of his servants, put him to the torture and then cast him out into the street. The injured man was found by the police, but died from his injuries within a few days. The Rajah was arrested, tried for murder, convicted and sentenced to transportation for life. An appeal was taken, but it is probable that the conviction will be sustained.

ENGLAND.

CONTRACT TO STIFLE A PROSECUTION.—In *Davis v. London & Provenc. Marine Insurance Co.*, 38 L. T. Rep. (N. S.) 468, decided on the 2nd of March last by the Chancery Division of the English High Court of Justice, one Evans, an insurance agent of defendant having become liable to it for certain sums of money, plaintiff, who was his friend, having been given to understand that defendant could and was about to prosecute him criminally, and that the police had been instructed to arrest him, agreed to and did deposit £2,000 in a bank as an indemnity and security for Evans' liabilities, under the belief that the criminal prosecution would in consequence be abandoned. Before the agreement and deposit were made the defendant was informed by his legal advisers, that the prosecution against Evans could not be maintained, and had withdrawn its instructions to the police to arrest, but plaintiff had not been informed of these facts. The court held that the agreement must be rescinded and the money repaid to plaintiff. The court concludes, that although

the contract was bad, whether as one to stifle a prosecution, or as induced by a misrepresentation that a prosecution was to be stifled when no prosecution was intended, plaintiff was not precluded from relief: first, because the money being *in medio*, something must be done with it; second, because illegality, arising from pressure or from an attempt to stifle a prosecution, is not sufficient to make the court stay its hand. The decision is not in conflict with that principle of law which forbids the courts from interfering to save a party who has entered into an illegal contract from the consequences of a failure by the other party to fulfill. In case of an agreement to compound a felony, the plaintiff, seeking to recover back money paid, cannot even claim relief on the ground of pressure. *Sheppard v. Dornford*, 1 K. & J. 401; *Sharp v. Taylor*, 2 Ph. 801; *Thompson v. Thompson*, 7 Ves. 470; *Farmer v. Russell*, 1 B. & P. 296. But see *Tennant v. Elliott*, 1 B. & P. 3; *Williams v. Bayley*, 4 Giff. 638. Such a contract, being one of suretyship, is not one *uberremæ fidei* to be upheld only in the case of there being the fullest disclosure by the intending creditor. But the contract must be based on the full and voluntary agency of the individual who enters into it, and when there is no consideration, as in the case at bar, a very little will do to authorize the court to interfere. Therefore, anything like pressure upon the part of the intended creditor will have a very serious effect on the validity of the contract and still more so where that pressure is the result of maintaining a false impression on the mind of the person impressed. See, also, *Hill v. Gray*, 1 Stark. 434; *Carter v. Boshm*, 3 Burr, 1905; *Peek v. Gurney*, L. R., 6 H. L. 377; *Keates v. Cadogan*, 10 C. B. 591; *Turner v. Harvey*, Jac. 169. *Pulford v. Richards*, 17 Beav 87; *Rees v. Berrington*, 2 Ves. Jun. 540.

LIABILITY OF CARRIERS.—In the case of *Berghum v. Great Eastern Ry. Co.*, 38 L. T., Rep. (N.S.) 160, decided by the English Court of Appeal on the 14th January last, it is held that the liability of railway companies as common carriers does not apply in the case of luggage over which they have not absolute control. In this case plaintiff went to defendant's station some time before the train started. A porter, by plaintiff's direction, placed his bag in the carriage. Plaintiff went away for a short time, and on his return the bag was gone. He brought

action to recover the value of the bag, and the jury found that neither defendant nor plaintiff had been guilty of negligence. The Court of Appeal held, affirming the decision below, that defendant was not liable as a common carrier, and therefore was entitled to judgment. The general rule has heretofore been supposed to be that a carrier of passengers is liable for baggage the traveller takes into the same carriage with him. "If a man travel in a stage coach" says *Chambre, J.*, in *Robinson v. Dunmore*, 2 B. & P. 419, "and take his portmanteau with him, though he has an eye upon the portmanteau, yet the carrier is not absolved from his responsibility but will be liable if the portmanteau be lost." See, also *Le Conteur v. Lond. & S. W. Ry.*, L. R., 1 Q. B. 54; *Richard v. Lond. & S. W. Ry. Co.*, 7 C. B. 39; *Hannibal, etc., R. R. Co. v. Swift*, 12 Wall. 262; *Cohen v. Frost*, 2 Duer, 335. But the rule that binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God and the public enemy, whatever may be the negligence of the passenger, has never been applied. *Talley v. Great W. Ry. Co.*, L. R., 6 C. P. 44. Here it was shown that the passenger, when changing cars, left his portmanteau unprotected, and the railway company was held not liable for a robbery of the portmanteau. And it has been held that a railway company is not liable for articles carried on the traveller's person, nor for overcoats, canes, and umbrellas, such as he usually has under his exclusive supervision. See *Steamboat Palace v. Vanderpool*, 16 B. Monroe, 302; *Tower v. Utica & S. R. R. Co.*, 7 Hill, 47.

In *Mulliner v. Florence*, 38 L. T. Rep. (N. S.) 167, decided by the English Court of Appeal, on the 28th of January last, one Bennet purchased horses and carriages of plaintiff and took them to defendant's inn, where he was entertained, and his horses and carriages kept for a long time. Bennett never paid plaintiff the price of the horses and carriages, and absconded from defendant's inn without paying his bill, and leaving the horses and carriages there. Subsequently, having been taken into custody on a charge of swindling, he re-assigned the horses and carriages to plaintiff, to whom, however, defendant refused to give them up until Bennett's bill was paid. Defendant afterwards sold the horses by public auction, and still retained the carriages. The court held, first, that defendant's lien

upon the horses and carriages was a general one for the whole of Bennett's bill, and that Plaintiff, not having tendered the amount of it to defendant was not entitled to maintain his action to recover possession of the carriages or damages for their detention, and second, that the sale by defendant of the horses was a wrongful conversion, for which plaintiff could maintain his action, and that the measure of damages was the value of the horses. The decision as to the lien of an innkeeper, extending to all the the property brought to the inn by the guest for all his expenses, is in accordance with the view taken by Story (*Story on Bailm.*, § 476), who says that the cases do not support the doctrine advanced by some that a horse can be detained only for his own meals. See *Thompson v. Lacy*, 3 B. & A. 383; *Sunboly v. Alford*, 3 M. & W. 248; *Proctor v. Nicholson*, 7 C. & P. 67; *Jones v. Thurloe*, 8 Mod. 172. The innkeeper cannot sell the property of his guest, but only detain it, and a sale is a conversion. *Jones v. Peasle*, 1 Stra. 557; *Luckbarrow v. Mason*, 6 East, 21, note; *Walter v. Smith*, 5 B. & A. 439; *Cortelyou v. Lansing*, 2 Ca. Cas. 200.

UNITED STATES.

A singular case is on trial in Brooklyn, where a Mrs. Malloy brings suit against St. Peter's Roman Catholic church, of which she is a communicant, for \$10,000 damages on account of injuries received by slipping on the icy steps of the church. She argues that as she was bound to attend mass under pain of mortal sin the church was bound to keep its approaches in a safe condition.

MOVABLES ANNEXED TO IMMOVABLES.—In *Groez v. Jackson*, 6 Daly, 463, chairs were furnished to a theatre of a pattern that had to be made with special reference to the size, shape, and plan of the auditorium of the theatre in which they were to be placed, and were screwed to the floor, as they could not stand alone. The court held that they formed a part of the building, and that a mechanic's lien could be filed and enforced against the building by the one furnishing them. In *Potter v. Cromwell*, 40 N.Y. 287, 297, and *Voorhees v. McGinnis*, 48 id. 278, three tests are given whereby the question whether a given article has become by annexation a part of the freehold: 1. To give to articles. personal

in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule in those articles which are not themselves annexed, but are deemed to be of the freehold, from their use and character, such as mill stones, statuary and the like. *Copen v. Peckham*, 35 Conn. 88; *Teaff v. Hewitt*, 1 McCook, 511. 2. A second test but not so certain in its character, is that of adaptability to the freehold. *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, id. 390. 3. A third test is that of the intention of the parties at the time of making the annexation. See cases above cited, and *Murdock v. Gifford*, 18 N. Y. 28; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Swift v. Thompson*, 9 Conn. 63. The English cases go further than the American in the direction of the principles stated. *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Boyd v. Shorrocks*, L. R. 5 Eq. 72; *Climie v. Wood*, L. R., 3 Exch. 257, and 4 id. 328. See also *Ford v. Cobb*, 20 N. Y. 344; *Cresson v. Stout*, 17 Johns. 116; *Vanderpool v. Van Allen*, 10 Barb. 157; *Swift v. Thompson*, 9 Conn. 63; *Walker v. Sherman*, 20 Wend. 636; *Taffe v. Warnick*, 3 Blackf. 111; *Tobias v. Francis*, 3 Vt. 425; *Gale v. Ward*, 14 Mass. 352; *Hutchinson v. Kay*, 23 Beav. 413. *In re Dawson*, 16 W. R. 424. Also *Pierces v. George* (108 Mass. 78), 11 Am. Rep. 310, and note at page 314, where the various authorities are collated.—*Albany Law Journal*.

REPEAL OF THE BANKRUPT LAW.—The following is the full text of the bill repealing the bankrupt law, as it finally passed and received the approval of the President:

"Be it enacted, etc., That the bankrupt law, approved March 2nd, 1876, titled 51, Revised Statutes, and an act entitled, 'An act to amend and supplement an act entitled, 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2nd, 1867, and for other purposes, approved June 22nd, 1874,' and all acts in amendment or supplementary thereto, or in explanation thereof, be, and the same are hereby, repealed. Provided, however, that such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall have effect, but as to all such pending cases and all future

proceedings therein, and in respect of all pains, penalties and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts, which for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors, except the right of commencing original proceedings in bankruptcy, and all rights of, and suits by, or against assignees, under any or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect, which shall be on the 1st of September, 1878, or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of in the same manner as if said acts had not been repealed."

CRIME IN ILLINOIS.—The *Chicago Legal News* of the 22nd inst. says: "George Sherry and Jeremiah Connolly were hung in the jail of this county, on yesterday morning, by Sheriff Kearn, for murdering McConville. Cook county never had so many prisoners in jail charged with taking human life, as at the present time. People are becoming exercised over the increase of murders and are demanding that something shall be done to stay the hand of the murderer. It would be well to study the effect of the execution of these two criminals upon the vicious, and see whether it will have a tendency to prevent crime."

COLLECTING AGENCIES.—The Committee of Clay County Bar publish the following notice respecting the action of the bar, unanimously declining in the future all division of fees with the so-called collecting agencies:

"At a recent meeting of the members of the Clay County Bar, it was decided by unanimous vote to decline in the future all division of fees with the so-called collecting agencies, which, by the aid of extensive advertising and persistent dunning, have for years imposed both upon the business men of the city and the attorneys of the country.

These agencies generally have their origin in the ambition of patriotic but impecunious individuals to serve their country by the publication of catalogues of "reliable attorneys," at the rates of from one to ten dollars per head. It is necessary that these catalogues be annually revised. The revision serves the double purpose of keeping the list "strictly reliable" and of marking the time for payment of annual dues. To be a "reliable attorney," the "only ones recommended," cost annually from one to ten dollars for each "bureau." These "bureaus" have become numerous; and, as a like sum is required to secure a situation with each, being a "reliable attorney," while gratifying to professional pride, is expensive.

Reading circulars from these "reliable bureaus," offering dazzling inducements (for \$2.50 and a division of fees) seriously encroaches upon the time of attorneys in actual practice—replies are out of the question. But the enterprising bureau man does not suffer his enterprise to be balked by the neglect of the "reliable attorney" (with \$2.50) to give his consent to be catalogued as a member of the bureau. In due time the catalogue is at hand, with the request that it be paid for or returned if not wanted, and the "reliable attorney," who dislikes to be in the position of a recipient of favors without paying charges, remits the "annual dues."

We desire to notify these bureau men who have often so kindly remembered us (for a small fee), that while we are solicitous for their welfare in general and in particular, in the future we shall decline to become "reliable attorneys." We do not desire to divide fees with those who have no part in earning them. We do not desire assistance in the way of procuring collections.

By the way of a return for past favors, if any of these gentlemen desire positions as hotel runners, or insurance agents, or in any other occupation where persistence and cheek are essential qualifications, where their peculiar talents will serve them, and their ambition find free scope, we heartily recommend them."

GENERAL NOTES.

The Court of Appeals of Kentucky, in the case of *Greer v. Church et al.*, decided on the 23rd of November, 1877, passes upon the effect of a contract purporting to be for the renting of a piano. The contract, which was in writing and

and signed by both parties thereto, set forth that Church & Co. had rented to one Mrs. Martin a piano valued at \$550, and that she agreed to pay as rent for the same \$400 for the first month; \$10 per month for six months thereafter, and \$20 per month afterward. Mrs. Martin was entitled to become the purchaser of the piano at \$550, and the sums received for rent for the first eleven months were to be allowed toward the purchase-price. It was in evidence that Mrs. Martin purchased the piano, paid on the contract \$410 and took possession of the piano, which she subsequently sold to appellant Greer. Church & Co. then replevied it. The court below instructed the jury, at the trial of the replevin action, that if the rent paid by Mrs. Martin on the piano did not amount to \$550, the plaintiff should recover. The Court of appeal reversed a judgment for plaintiff, holding that the transaction was a purchase and not a lease, and that no matter whether the parties intended the title to pass or not the law would, in furtherance of public policy and to prevent fraud, treat the title as being where the nature of the transaction required it to be. See, as sustaining a similar doctrine, *Domestic Sewing Machine Co. v. Anderson*, 15 Alb. L. J. 64, where the Supreme Court of Minnesota held in the case of a sewing machine which was alleged to be leased and a written contract of leasing produced, that parol evidence was admissible to establish a contract of sale, antecedent to the lease, and that the lease was in consequence void for want of consideration. See, also, note of case upon *Victor Sewing Mach. Co. v. Hardus*, 16 Alb. L. J. 442, where a similar agreement, in respect to a sewing machine, was treated as invalid upon other grounds.

An *ex parte* application was made to a police magistrate in open court by certain persons who had been employed by the plaintiff upon a railway, for a summons against the plaintiff under the Masters and Servants Acts, 1867 (30 & 31 Vict., c. 141), on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within his jurisdiction to do so, and afforded no ground for criminal proceedings. The defendants, who were newspaper proprietors, published a fair report of the proceedings before the magistrate, which contained matter defamatory to the plaintiff. *Held*, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*.—*Usell v. Hales*.

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SHAREHOLDERS AND DIRECTORS.

Amid the embarrassments of financial depression an unusual number of shareholders in joint stock concerns are smarting under the losses which reckless management, inattention, or fraud on the part of directors have inflicted upon them, and various attempts have been made to hold the latter accountable. In the case of *Rhodes v. Starnes et al.*, a case which came before the Superior Court at Montreal, Mr. Justice Johnson, on the 28th ult., disposed of one of these actions, and as the points examined by the learned Judge are of much interest at the present time, we give our readers the opportunity of perusing his Honor's remarks *in extenso*.

In connection with this case we may notice one which was recently decided by the Supreme Court of Illinois, *Chetlain v. The Republic Life Ins. Co.* The action was by the company to enforce payment of notes given by one Walker, deceased, now represented by the appellant, Chetlain, in payment of twenty per cent. on the shares subscribed by him. The Court stated the principle that the directors of a corporation are the agents or trustees of the stockholders, and the latter are bound by their acts within the scope of their authority; when their acts are outside of, and beyond the scope of their authority, the stockholders are not bound by such acts, and may in a reasonable time proceed in equity to have the act cancelled. In the case under consideration, however, it was held that even if the purchase, by the directors, of an expensive building for the corporation, was *ultra vires*, yet, after a delay of over two years and a half, on the part of appellant's intestate, to take any steps manifesting his disapproval, or to avoid the purchase for that reason, it was too late to insist upon the plea of *ultra vires* as a defence to the action to enforce payment of notes given for subscription to stock. The same was said with reference to an act of the directors specially complained of, viz.: the purchase of the stock of the National Life Co. The fact that the

directors had acted beyond their power, or abused it, would not discharge a stockholder or debtor from his obligations to the corporation. The Judge remarked: "The mere mismanagement of the affairs of a corporation has never been held to release stockholders or others from their obligations to the company. When Walker purchased and became the owner of this stock, whether paid for in money, notes or otherwise, he became entitled to all of the privileges and benefits of a stockholder, and liable to all the burthens the relation imposes. Had there been dividends, he would have been entitled to share in them. Had there been losses imposing liabilities on stockholders, he would have been required to respond to them. The stockholders are the owners of the franchise, property and assets of the company, which remain after its debts and liabilities are discharged. For convenience in the transaction of business, and to carry out the purposes of the organization, the charters of such bodies usually authorize the stockholders to choose a certain number from among themselves as directors, who are empowered to transact its business and exercise its franchises. And in doing so, they are agents or trustees for the stockholders, and the latter are bound by their acts, within the scope of their authority. When their acts are outside of and beyond the scope of their authority, the stockholders are not bound by such acts, and may, no doubt, in a reasonable time, proceed in equity to have the act cancelled, and their rights protected from injury and loss, growing out of the unauthorized act."

TESTS OF INSANITY.

In a work recently issued from the press by Prof. Ordronaux, State Commissioner in Lunacy for New York, entitled the "Judicial Aspects of Insanity," the writer criticises the dictum of the N. Y. Court of Appeals, in *Flanagan v. The People*, 52 N.Y. 467, that "the test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of, and with respect to, the act complained of, and that the law does not recognise a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them. "A hour's conversation with the insane in any asylum," remarks Prof. Or-

dronaux, "will suffice to show that delusions are not omnipresent, and that the knowledge of right and wrong is common in all forms of mental unsoundness outside of idiocy and dementia. All experts in insanity affirm this, and it has also been put upon record in the most emphatic manner. Thus: at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1864, at which were present fifty-four medical officers, it was unanimously resolved, "That so much of the legal test of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." "

Pointing out the danger of exclusive reliance upon any particular test, the author cites with approval the following opinion of Dr. Ray: "Jurists who have been so anxious to obtain some definition of insanity which shall furnish a rule for the determination of responsibility, should understand that such a wish is chimerical from the very nature of things. Insanity is a disease, and, as is the case with all other diseases, the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

RHODES v. STARNES et al.

Bank—False Representations in Reports—Liability of Directors.

1. Reports made and accounts rendered by Directors in the course of their duty, though made and issued to the shareholders only, as to the state of the affairs of the Company, are considered the representations of the Company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or a general meeting.

2. Directors of a company are personally liable for injury caused by false representations, but the injury must be the immediate, and not the remote consequence of the representation.

JOHNSON, J. This case might have been disposed of before, if the record had been before me; but it was not; and in view of the great amount of supervening business, I thought it best to discharge it, so that the parties might submit it afresh. It has come up again by consent, and I now proceed to give judgment. It has some importance—not only on account of the amount of money lost in this concern, but also perhaps in point of the difficulty to some extent in applying accurately principles of law which unhappily in our day have had to be applied, under an infinite variety of circumstances, to facts more or less like those in the present case. First, I must see precisely what it is that the plaintiff alleges—then what he deduces from what he alleges; then whether these deductions are warranted by the facts as they appear, or even as they are alleged. I wish to avoid verbal reference to the technical language of the declaration; because what I have to say will be long enough without that; and perhaps, more intelligible also; but I will omit nothing that is essential; and where absolute precision is requisite, I will take the words of the declaration, and of the law.

The action is brought to recover from the defendants damages stated at \$10,000, being the nominal value of one hundred shares of stock in the Metropolitan Bank, which the plaintiff purchased in July, 1872; and it rests upon alleged false representations, and fraudulent artifices and conduct of the defendants as directors and president and managing directors of that Bank, by which the plaintiff was induced, as he avers, first to purchase the stock in question, and subsequently to retain it until the entire collapse of the bank in the autumn of 1875, at which time the shares became unsaleable, and ultimately proved to be worth not more than forty per cent. of their nominal value. This is a succinct and general way of putting what the plaintiff sets up as the grounds of his case; and as a general proposition, and under certain circumstances, it may be at once admitted that an action against directors might lie for an injury done to an individual by inducing him by false representations to purchase stock. There are numerous and well-known decisions to that effect; though

for the most part they seem to have been founded on false prospectuses, and not on reports to the shareholders—a distinction which has given rise to some discussion; and which I need not further notice at this moment. Then we have our own Banking Act, and our Civil Code establishing a general principle of liability, of which I will not stop now to discuss the limitations, because I gathered from what the defendants' counsel said that he conceded the general principle, or rather a general principle, though he by no means conceded any violation of it in the present instance. The first thing therefore will be to see exactly what are the precise misrepresentations and frauds charged. The misrepresentations charged against the defendants are those said to be contained in the annual statement of the 30th of June, 1872, in reliance on which the Plaintiff says he purchased his shares. This statement was submitted to the shareholders at the annual general meeting, on the 2nd of July of the same year. The plaintiff purchased on the 24th of July, at a premium of $5\frac{1}{2}$ per cent., which, he says, the stock would have been well worth, if the statements of the directors had been true. The plaintiff then goes on to specify the precise things that were said in this statement of the directors, and in what respects they were untrue and likely to deceive him. He says, first of all, it asserted that the capital stock paid up was \$636,200; and he insists that in this particular it was false, inasmuch as a considerable portion of the capital said to be paid up was only colorably paid up by collusion among the defendants, and not intended to be paid up at all. The report was as follows: "The directors of the Metropolitan Bank submit to the shareholders their first report embodying the balance sheet, and statement of profit and losses, for the year ending 30th June, 1872. The Bank commenced business nominally in July last; but it was only towards the end of August that it was able to do so actively. The various calls have been punctually met, and many shares have been paid in full. The average capital during the year has, notwithstanding, been only \$420,000, so that the result will, it is hoped, be satisfactory, and justifies the expectation that with the larger paid up capital of \$636,200, still greater profits will be realised. It is not the intention of the directors to make any new calls at

present, though the option will be given to the shareholders, as heretofore, to pay up in full. It was deemed expedient a few weeks ago to commence the issue of notes, and the circulation has now reached \$79,848. After dividing eight per cent on the paid up capital, the sum of \$15,000 has been carried to a rest, leaving a balance at the credit of profit and loss of \$4,652.69. The probable further advance in the value of real estate, and the difficulty likely to arise in procuring suitable sites for banking purposes, have induced your directors to purchase the premises now occupied by the Bank at a price upon which an advance can already be got."

The declaration then goes on to say that Mr. Starnes, the President, further stated that the paid-up capital was \$636,200, and the average capital from the July previous up to the time of the report was \$420,000, and the profits for the year ending June, 1872, were \$55,277.39. The next allegation is one that might have had very great importance, if it could be referred to any particular point of time; it is this: "The plaintiff further alleges that notwithstanding the provisions of the act respecting banks and banking, the said directors have collusively and fraudulently loaned to each other for speculative purposes large sums of money belonging to the said Bank upon collusive and fictitious security, and to more than double the amount which, by virtue of the said statute, the said directors could lawfully borrow from the said bank, and a large portion of the indebtedness so incurred is still unpaid by the defendants." I say this allegation would be of importance if it referred to any precise time. If it charged, for instance, that *before* the plaintiff became a stockholder at all, the defendants had unlawfully used vast sums of the funds of the Bank, and that the plaintiff misled by their concealing the fact, had bought, and suffered in consequence, the relation between the concealment of the fact, and the plaintiff's purchase and loss might have directly borne on the question of their responsibility; and more than that, there might have been a direct relation between that fact and the mode of payment of the calls; but if, on the contrary, this allegation is intended to refer to their misapplication of the funds *after* the plaintiff's purchase of shares, not only could there, on that score, have been no concealment of it possible at the time of the purchase; but the differ-

ence would also be very important in another respect, for the relation of the directors to the plaintiff would then have been a very different relation; from being a stranger and an outsider, he would have become a shareholder and member of the corporation, and their responsibility to him *qua* shareholder might essentially differ from their responsibility to an individual not a member of the corporation. Therefore I say, the absence of all particularity as to the time of the alleged delinquency on their part must prevent its having any effect whatever as a concealment of facts in the report which, if known to the plaintiff, would have prevented him from buying his stock. The rest of this declaration refers only to what occurred after July, 1872—the buying of the stock, the price paid for it, and the subsequent annual meetings up to 1874 inclusive, what was done at those meetings, and the untruth of the statements and representations they contained. The plaintiff's case, then, as he puts it, is made to rest on the fraud and misrepresentation of the defendants as affecting every part of it; and he brings it under two separate heads: 1st, he says: your misrepresentation of certain facts induced me to buy, and what you represented being false, you are responsible to me for the loss I have suffered through it; and 2nd, he says: after I bought, you continued your frauds and concealment and false reports, and therefore you are further answerable to me personally for the loss I sustained from what you did after I was a shareholder in the bank. The defendants, Starnes, O'Brien and Cuvillier, have pleaded a general denial. The two other defendants, Judah and Hogan, specially deny any fraud or misrepresentation, and any acquiescence in fraud or misrepresentation by them; alleging, on the contrary, that they acted in good faith, and to the best of their judgment; but admitting that they were elected directors, and that the reports were made in the terms alleged. Subsequently, owing to an amendment in the declaration, the two last named defendants pleaded further that the plaintiff had no right of action for what occurred after he became a shareholder. The reports are produced and proved. It further appears by the evidence that during the year 1871 fifty per cent. of the capital was called up by five calls of ten per cent. each, all of which had become due in February, 1872. In April

of that year the defendant Cuvillier owed \$28,565, for calls and interest. For this sum he gave his own promissory note, payable on demand. The amount of this note was placed to his credit in the bank's books, and he then gave a check for it. in payment of the calls. On the defendant Hogan's shares, he only paid two calls in cash not got from the bank; the remaining three calls he arranged for by money advanced to him by the bank on his letter or undertaking, and the amount being placed to his credit, he drew a cheque for what was in arrear, viz.: \$17,700. Starnes did the same thing as Hogan, the amount in his case being \$14,320. These sums amount to \$60,584. The plaintiff deduces from these facts, that this report was absolutely false in several particulars: First, he says that the capital was not paid up, because these payments were merely colourable and collusive, and in reality there was no intention that they ever should be paid at all; and the capital must therefore *pro tanto* be held to have been reduced; 2nd, he contends that these payments—whatever they may have been, whether colourable or not, were overdue before they were made; 3rd, the plaintiff deduces from this state of facts that Starnes' statement that there were no bad or doubtful debts was untrue; and fourthly, he deduces that the \$55,000 odd of profits was also a delusion, because in the calculations showing that amount of profit, these demand notes and letters were included as assets. I am bound to say that from the evidence of record I have no doubt whatever of the mere facts themselves from which these conclusions are deduced by the plaintiff; I have no doubt that the calls were paid by the proceeds of loans or discounts; but as to all the inferences of fraud or collusion and intent never to pay them at all, I think they must be considered with reference to all the evidence in the case, to see if they are just. I am now on the first branch of the case, i. e. the plaintiff's complaint that these were false representations by which he was induced to buy, and by which he has suffered loss. The first thing to look at will be: what is a false representation? how made and to whom? and a second point, one would think, would be: if false statements are made by directors of banks, and adopted by the latter, on whom is the responsibility to fall? on the directors personally, who are agents of the

Bank? or on their principals, the Bank itself that adopted and profited by these reports? or, is it to fall on both? Yet none of these points have been noticed at all; though they certainly up to a very recent date, were most seriously discussed in England. A collection of case-law on this and cognate subjects is to be found in Shelford's law of joint-stock companies, and other books referring to the highest sources of authority in cases of this description in England, both on the question of a report of directors being in any sense a representation to an outsider who buys on the faith of it, and also on the point whether it is to be considered a report of directors, or, (after its adoption by the Bank), a report by the latter, as having approved of it and profited by it. I will read now from Mr. Shelford's work, cap. iii., par. 15, p. 56: "Reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state and affairs of the company, are considered the representations of the company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors, or a general meeting. But such reports and accounts made and issued to the shareholders are not the representations of the company to a person who obtains knowledge of their contents only from private sources. The various judgments with respect to this part of the law, are very conflicting, both on account of the view formerly taken by the courts as to the difference between companies and other persons as to their liability for the frauds of their agents, and from its having been considered that reports made to shareholders could not be considered reports made by them. The real question, however, seems to be, whether the person deceived has obtained knowledge through persons he has a right to consider authorized by the company to afford such information."

"Moreover, it is conceived that many of such matters, such as reports made to the general meetings of railway companies, are of so public a nature that they must be considered as issued to the world at large."

Vice-Chancellor Kindersley said he had decided *Brockwell's* case on the principle that the report of a joint stock company was in effect a public document. *Brockwell's* case had been

overruled by *Mizer's* case; but the reasons of Vice-Chancellor Kindersley were not questioned, and have since been expressly approved in the House of Lords in the case of the *Western Bank of Scotland v. Addie*. This proposition is that which the courts of equity now adopt. In the case of the *National Exchange Bank of Glasgow v. Drew*, 2 Macq. 103, Lord Cranworth said: "What is the consequence of the Company receiving a report and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract thing, can represent or do nothing: it can only act by its managers; when therefore the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others, as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it, in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company; otherwise companies of this sort would be in this extraordinary predicament, that they may employ, nay must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false, and ever so fraudulent, and yet that the company might benefit by those representations."

And again in the same case, Lord St. Leonards said: "I have certainly come to this conclusion, that if representations are made by a company fraudulently for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made to them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company; although it may be a representation to the company, it is their own representation." These remarks are sanctioned by Lord Chelmsford in a more recent case, that of *The Western Bank of Scotland v. Addie*, L. R. 1. Sc. Ap. 156. Again, Lord Westbury said: "If reports were made to the shareholders of a company by their directors, and adopted by the shareholders at a regular meeting, and those

reports were afterwards industriously circulated, undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and, therefore, binding the company; and if those reports, having been industriously circulated, should be clearly shown to be the proximate and immediate cause of shares having been bought from the company by any individuals, undoubtedly it would be impossible consistently with the principles of equity to permit the company to retain the benefit of that contract, and to keep the purchase money." *New Brunswick R. & Land Co. v. Conybear*, 31 L. J. 302.

A great number of cases more or less distinguishable from each other, and from this one, in some of their details, are collected in this volume, and in a much later work by Mr. Buckley—the second edition of which was published in 1875—and without now going into them, I will only say, that whether the corporation itself be liable for representations made in this report; or whether the directors alone—or whether both alike are liable—if they should turn out to be false and to have caused injury, there is abundant authority and reason for holding that such a representation by whomsoever made, and on whomsoever binding, is a representation made to the outside public, and which the plaintiff might properly treat as a representation made to him. I will only add on this point the words of V. C. Kindersley in the *National Patent Steam Fuel Co. v. Worth*, 4 Drew, 529, "It has been the opinion of the most eminent judges of the present day that if in a body like this, consisting of a great number of shareholders, the directors whose duty it is to present a balance sheet or report to the body at large containing a representation of the state of the affairs of the company, if that body exercising that duty or that function, make a report that is entirely false, and if that is made to a public and general meeting, although there be no order to publish it either by the directors or the body at large, from the very nature of the case, it must be made public."

Whether the corporation itself, having adopted the acts of their directors, and profited by them—having gone on, as the record shows, for some three years after this report of 1872, could itself be made liable for the consequen-

ces of it to the plaintiff, is a point not raised at all in the case; and indeed, if it were, it would be quite immaterial if the law also made the directors personally liable. Now, upon the point of personal liability on the part of the directors in certain cases, there can be no manner of doubt whatever. Whether this is one of those cases is another question; but the law of Lower Canada on the subject is, I think, quite clear. The 62nd section of our Banking Act of 1871 says, that "the making of any wilfully false or deceptive statement in any account, statement, return, report, or other document, respecting the affairs of the Bank, shall, unless it amounts to a higher offence, be a misdemeanor; and any and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the Bank, preparing, signing, approving or concurring in such statement, return, report or document, or using the same with intent to deceive or mislead any party, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such party in consequence thereof." Here we have both criminal and civil responsibility—the latter expressly extended to bank directors, in terms perhaps different from those of the common law, that finds expression in art. 1053 of the Civil Code: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." Therefore I think we must see whether this was a false representation within the meaning of the law, and which was the immediate or proximate cause of damage to the plaintiff. I have stated already what is the proof as to the mode of payment of the calls, and also how the plaintiff arrives at the conclusion that there was a diminution of the capital because the payments were collusive and colorable only—that is to say sham or simulated, and indeed expressly charged in the words of the Declaration, to have been made in that manner because of the intent that they should never be paid at all. I must say at once that in my opinion the plaintiff has entirely failed in proving anything of that kind. To avoid the risk of any inaccuracy on this point, and to see exactly what it is that the plaintiff does assert, in contradistinction to what he does not

assert, perhaps I had better refer verbatim to this part of the declaration: "And the plaintiff saith that the said reports, both written and verbal, so made as aforesaid by the said defendant, the said Honorable Henry Starnes, as the mouth-piece and organ of the directors of the said bank, were, and each of them was false and fraudulent, and more especially false in this respect: that it was asserted by the said reports and by the said president, that there was an amount equal to \$636,200 of the capital stock paid up, whereas in truth and in fact a large portion of the capital which was pretended by him and by the said directors had been subscribed in the said bank, was so subscribed merely colorably, without any *bona fide* intention on the part of the defendants of paying for the same. . . . That the said directors knew when they made the said report, that the said sum of \$636,200 was not in fact paid up on account of the Bank; but on the contrary was represented on the books of the Bank by promissory notes of the said directors *colourably, collusively and fraudulently introduced into the books, and pretended to be discounted therein, which were never intended to be paid.*" This is what he says, and what, therefore, he must be held to mean; he does not say, and cannot mean, that if this arrangement had been made in good faith, with the intention and the ability at the time to carry it out, the calls would not in effect have been paid, or the capital have been diminished. He probably could not have said with any show of reason that the capital was not paid in the way that the Bank consented to take payment; and there is no allegation whatever that the directors, as agents of the Bank, went *ultra vires* in taking payment in that way, if they acted in good faith. He could only mean that there was in fact no such consent given, because the whole thing was a fraud and a pretence to avoid payment; and this is, I take it, precisely what he does say. It is certain, therefore, as far as language can make it certain, that the plaintiff rests this part of his case on the arrangement for the payment of calls having been a simulated one; and not on their having been valid arrangements between the parties to them which if faithfully contracted and carried out would have diminished the capital. I say that in my judgment he has proved nothing of the kind. He has proved

something of a very different kind. He has proved that at the time of the report, these calls were paid in a manner that I do not say is a right manner of paying calls; (for if I did I should be saying that the capital of the Bank might consist entirely of the credit of its shareholders) but that is not at all the case of the plaintiff, as he puts it himself. He does not say that this Bank could not in good faith debit a shareholder with a loan, and credit him with a payment; he says they did not do that, but only pretended to do it; that the thing was a sham, and there was never any intention of paying at all. That position is not supported by the evidence, which shows not only that some of these loans have been since paid and discharged; but that the credit of Cuvillier, the principal borrower, was at that time very high. Can I say then, without a particle of proof as to any motive such as might have been furnished by evidence of the abuse of the funds at that time, that there is proof that this arrangement was a sham; and that the directors made a willfully false report with intent to mislead? If I could say that, I should then have to be satisfied that such false statement on their part was the cause of the damage complained of; but I cannot see that; and therefore in making that report, the directors, though they may have fallen short of their duty to the Corporation in trusting anybody for stock—a question between them and the Bank whose agents they were, they may have done so without being in fairness chargeable with a mis-statement to others with intent to deceive. They may have erred in judgment also perhaps; but if they in good faith took that mode of payment as satisfactory in their judgment at that time, they would not have told the truth if they had said that the calls had not been paid. It is certainly true that they did not say in their report in what way the calls had been paid; possibly, if they had been asked, the truth would have come out, but who is to blame for that? There is a case of recent date—the case of *Peek v. Gurney* to which I called counsel's attention. It is a leading case (vol. 6 English and Irish Appeals), and it turned principally upon whether a misrepresentation in a prospectus could be a misrepresentation to a purchaser in open market after all the shares had been allotted, and the office of the prospec-

tus ended. But a variety of other points arose in that case—among them one very like this; and Lord Cairns said: "Mere non disclosures of material facts, however morally censurable, however they might be a ground in a proper proceeding, at a proper time, for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation."

Referring further on to what was insisted on in that case as a misrepresentation, Lord Cairns observed: "Strange as it may appear to us now, when looked at by the light of subsequent events, I am not satisfied that this statement was not perfectly consistent with the opinion the directors really had." In the present case I cannot doubt that the directors considered it was a good payment, and, therefore, in the absence of evidence of motive, ought to be absolved not only from intent to mislead, but from the charge as it is brought of having misrepresented a fact. Of course I am aware of the distinction between criminal and civil responsibility. I am not prepared, however, to say that that distinction does not in reality disappear under our Statute of 1871, passed after the Code, and defining perhaps the liabilities of directors differently from those of other persons as settled by the article of the Code. That point, however, is not raised, and I shall only observe that in my opinion it is immaterial whether in the present case, such a distinction is made or not, for I am quite certain in my own mind, after a pretty carefully cultivated acquaintance with this record, that the plaintiff has suffered no injury or loss from the representation thus made. The rule to be acted on was laid down by Lord Hatherly when he was Vice-Chancellor, in *Barry v. Croskey*. That case was referred to by Lord Cairns in giving judgment in *Peck v. Gurney*, and the principles reduced to three: "First, that every man must be held responsible for the consequences of a false representation made by him to another upon which that other acts, and so acting is injured or damnified; Secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such

third person in the manner that occasions the loss or injury;" "and thirdly," he continues: "but to bring it within the principle, the injury must be *the immediate, and not the remote consequence of the representation made.*" Now what do we find to be the case here? The plaintiff buys stock in July, 1872. He remains a shareholder from that time up to June 1876, when he brought his action, and for aught I know is so still. During all that time that he held his stock with the presumable knowledge, or what is the same thing, the means of knowledge of what the directors were about; with the same means at his disposal at all events, as all the other stockholders, and the power of questioning them at every meeting, and either getting all the information he desired, or being refused it, and acting accordingly; he continues during all that time to hold the power which he can exercise whenever he finds it profitable, of selling the stock in question, but decides not to do so; and after three years, when the crash has come, he turns round and says to these directors: you told me in your report in 1872 that the capital stock was so much—which was false, because the payments of the calls were made with the proceeds of a sham loan which was never intended to be paid; and by that statement you have caused me \$10,000 damages. This is his first complaint. Then, he goes on and shows, as I think, conclusively, that he cannot be right in saying that his loss can be attributable to the stock not having been paid; for he says, further, you have squandered all the capital. It is true, he gives no time as to this squandering of capital, and, therefore, it cannot serve as a motive for concealment in the report; but we must take it as true as against him, for he says it himself. Now, it must have been either before or after the report, and in either case, according to the plaintiff, the statement in the report would have been immaterial; since, if the capital had all been paid in gold, it was equally squandered. Of course, if it was a misrepresentation, the the additional wrong of squandering the Bank's funds could not excuse it; but it remains true, also, that the false statement was not the cause of the injury; for, to use Lord Cairns' words, "the injury must be the immediate, and not the remote consequence of the representation." I need not dwell upon the other conclusions deduced by the plaintiff, from the fact or assump-

tion that there was misrepresentation as to the payment of the calls. They all depend upon whether that was a statement that was wilfully and absolutely false, or whether it was a statement that was true in the sense that these payments were *bona fide* considered by the directors as available assets of the bank. I have already given my judgment upon that point, and it therefore appears to me that the first part of the plaintiff's case must fail. Confining myself to the first part of this case, and to that alone, I find that all authority is against subjecting directors to personal responsibility, however imprudent their conduct may seem, unless it is shown that it has been prompted by fraudulent and improper motives. There is nothing of this kind brought to bear upon the time of the first report; and, therefore, if the grossest misconduct were proved afterwards, should have no concern with it in the present case.

I decide the case upon the grounds that I see no wilful misstatement leading immediately or proximately to the injury complained of; and because it appears to me, upon the whole, that the plaintiff who here asks damages for having been induced to purchase his shares by misrepresentation, cannot complain, if he has continued to hold them without objection after knowledge, or with the full means of knowledge, of the truth or untruth of the representations on which he bought them. The case seems to me analogous in principle to that of *Peck v. Gurney*—in one part of that case, where Lord Chelmsford said: "The Master of the Rolls proceeded upon the principle established by many decided cases, that an allottee or purchaser of shares in a company seeking to divest himself of them upon the ground of having been induced to purchase by misrepresentation, cannot be relieved, if he has continued to hold them without objection after knowledge of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle that an agreement produced by fraud is not absolutely void; but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescission of the contract; but is founded on the loss the appellant has sustained, and is similar to an action for deceit."

Upon the second part of the case, the responsibility of the defendants to the plaintiff for what occurred after he became a shareholder, it is not expected probably that I shall say much. I am quite satisfied upon principle and upon express authority cited that all that is alleged to have taken place after the meeting of July, 1872, constitutes an injury to the corporation to whom alone an action would on that account belong; and I have no doubt that portion of the Declaration might have been demurred to. As I am not able to give judgment against any of the defendants, I am not called upon to discriminate between them. After all that has been said, however, as to malfeasance, it is only proper to observe that as regards the defendant O'Brien, he was not a director at all until some time after the report of 1872; and as respects Mr. Judah, the plaintiff's counsel admits that his name was used without authority by Mr. Starnes in a loan account opened by the latter; and indeed it appears from his own testimony that he sold his stock in March, 1872, and only attended to watch the interests of the City and District Savings Bank, of which he was president. That there were speculations in stocks with the funds of this Bank is not only true, but was assigned by Mr. Judah as the reason for selling his stock. On a thing of that sort probably all sober people have the same opinion and I need not give mine now, but it was a matter between the shareholders as a body—that is, the corporation and those persons who so used the funds, and has nothing whatever to do with the representation made in the report upon which the plaintiff expressly puts his case, and which, he says, had it been a true report, would have made his stock worth all that he paid for it; and I gathered from what was said at the hearing, that the corporation had practically renounced its claim against them. Before concluding I will mention one other consideration which appears to me to have weight in this case. The case of *Peck v. Gurney* has been referred to already; but there is one part of Lord Cairns' admirable judgment in that case that seems to bear directly on the position of the parties here. That was a case of misrepresentation also—the only difference being that there it was in a prospectus, and here in a directors' report. The

office of the prospectus was over—all the shares having been allotted;—in other respects the principle of liability and the duration of it were the same as in the present case. Lord Cairns' language was this: "Now, my lords, I ask the question, how can the directors of a company be liable after the full original allotment of shares for all the subsequent dealings that may take place with regard to those shares upon the *Stock Exchange*? If the argument of the appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus"—and so I would observe it might rise or fall here from circumstances altogether unconnected with the report—"and yet, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold for all that may be expended in buying the shares. My lords, I ask, is there any authority for this? I am aware of none." It must be allowed, of course, that Lord Cairns asked and answered this question in a case where liability had ceased, because the office of the prospectus in which the statement had been made was over, and the plaintiff had bought afterwards in open market. As far as responsibility for misrepresentation is concerned, there was that difference between that case and this one, and there was no other difference: it was a difference as to the existence of responsibility; not as to the duration of responsibility, if it existed. Therefore as to the duration of existing responsibility, that case and this one are on the same footing; and it was as to the injustice of the duration of this responsibility, if it existed at all, that Lord Cairns was speaking.

The plaintiff's action must be dismissed; but as to costs, it is entirely owing to the fault of the defendants that the plaintiff has taken these steps; and though they made no intentional misstatement; and therefore no action can be maintained against them for it, they will get no costs from the plaintiff; and the action is under the circumstances dismissed without costs.

Abbott & Co. for plaintiff.

Judah, Wurtels & Branchaud, for defendants.

CIRCUIT COURT.

Montreal, May 22, 1878.

DORION, J.

LEPAGE v. WATSO, and WATSO, Opposant.

Property of Indians—39 Vict. (Canada) C. 18.

Held, that under the Indian Act of 1876 (39 Vict. c. 18), the moveable effects of Indians are exempt from seizure, and the fact that an Indian is a trader and trades with whites does not render his effects liable to seizure.

2. That the word "property," used alone in a statute, includes both moveables and immoveables.

Opposition maintained.

J. G. D'Amour for opposant.

Duhamel & Co. for plaintiff contesting.

DISPUTED QUESTIONS OF CRIMINAL LAW.

(Continued from page 307.)

III. Uncommunicated Threats.—Two new cases are reported on the question of the admissibility, on trials for homicide, of evidence of utterances by the deceased, threatening the life of the defendant, such utterances not having been reported to the deceased. One of these cases, decided in 1877 (*The State v. Taylor*, 63 Mo. 358), has a head-note which states explicitly that uncommunicated threats by the deceased are inadmissible when offered by the defendant. When we examine the opinion of the court however, we find that the ruling is limited to cases where the defendant makes no claim to have been acting in self-defence. "The court," says Henry, J., "properly refused to admit evidence of threats by Ghenn against defendant. It is not pretended that defendant, when he killed Ghenn, was acting in self-defence. Defendant was aggressor in the difficulty in the forenoon, and when shot by defendant, Ghenn was not only making no attempt to injure defendant, but was unarmed and endeavoring to escape from him."

The other case is *The State v. Turpin*, 77 N. C. 473, also decided in 1877. In this case a "per curiam" opinion was given by Bynum, J., who says:

"1. The uncommunicated threats were admissible for the purpose of corroborating

the evidence of the threats which had been already given.

"2. They were admissible to show the state of feeling of the deceased towards the prisoner and the *quo animo* with which he had pursued his enemy to the house.

"3. In ascertaining whether the prisoner had acted in self-defence, a most material question was, Who introduced the rock into the conflict, and for what purpose? . . . To corroborate this view, and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case *the threats were equally admissible, whether communicated or uncommunicated*, and, in connection with the other facts indicating a felonious assault upon the prisoner, would constitute a case of murder, manslaughter, or justifiable homicide, as the jury, under proper instructions, might determine upon all the facts."

Prior to these cases, but not cited in either of them, we have *Wiggins v. The People*, 3 Otto, 465. In this case we have the following from Judge Miller:

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, section 1027. 'Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. • The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life.' *Stokes v. The People of New York*, 53 N. Y. 174; *Keener v. The State*, 18 Ga. 194; *Campbell v. The People*, 16 Ill. 18; *Holler v. The State*, 37 Ind. 57; *The People v. Arnold*, 15 Cal. 476; *The People v. Scroggins*, 37 Cal. 676."

"Certainly," as I argued in discussing more fully this question in my work on Homicide, "if such evidence is offered to prove that the

defendant had a right to kill deceased, then it is irrelevant." But "it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, he should have applied to the law for redress; if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. . . . For the purpose, therefore, in cases of doubt of showing that the deceased made the attack, and, if so, with what motive, his prior declarations uncommunicated to the defendant are clearly evidence."

It may be objected that such evidence is hearsay. To this it may be answered:

1. It is primary; and hearsay, when primary, is admissible when relevant. The question at issue is, Did the deceased attack the defendant? self-defence being in issue, the defendant is not bound to prove an attack by the deceased—to show, in other words, that his object in meeting the defendant was to attack him—the deceased's intention is material. How is this intention to be discovered? If the deceased were alive, we would call him and ask him as to the facts. He is not alive, and the best evidence we can have of an intended attack on his part is his own expressions, whether in word or in deed. If we reject these expressions, then we have no other way of proving a material fact.

2. Whenever the condition of a party's mind is at issue, then expressions of the party are admissible, when tending to throw light upon such condition. See *Hadley v. Carter*, 8 N. H. 40; *The Commonwealth v. O'Connor*, 11 Gray, 94; *Howe v. Howe*, 99 Mass. 88. This is eminently the case when the party whose declarations are to be proved is dead, and when his state of mind, when material, can be proved in no other way than by his declarations. In *R. v. Johnson*, 2 Car. & Kir. 354, where the prisoner was charged with murdering her husband, and when the deceased's state of health prior to the day of his death became material, a witness was called to prove declarations on this topic by the deceased a day or two

before the death. This was objected to by the prisoner, but was admitted by Alderson, B., who said that he thought that what the deceased said to the witness was reasonable evidence of the deceased's state of health at the time. And, in a suit on a policy of life insurance, it was held admissible to show that the deceased had made declarations at various times as to his health at variance with those which he had given to the defendants. His good faith at the time was at issue, and his declarations were held admissible to negative such good faith. *Aveson v. Kinnaird*, 6 East, 188; *Witt v. Klindworth*, 3 I. & T. 143.

CURRENT EVENTS.

ENGLAND.

CONTRACT—OFFER AND ACCEPTANCE.—In *Lewis v. Brass*, (London L.T., Feb. 9, 1878, p. 738), defendant sent in a tender to do certain work for plaintiff. Plaintiff's agent replies, accepting the tender, and adding: "The contract will be prepared by," etc. *Held*, That the tender and acceptance formed a complete contract.

LEASE—OPTION TO PURCHASE.—In the case of *Edwards v. West*, (London L. T., p. 481, June 1, 1878), under the terms of a lease, the lessees had an option to purchase the fee simple of the property for a fixed sum, on giving notice before a fixed date. It was also agreed that if the premises were injured by fire to a certain extent, the time should absolutely determine. This event happened before the exercise of the option to purchase. *Held*, that the option to purchase continued, notwithstanding the term had been put an end to.

UNITED STATES.

SALE OF COLLATERAL SECURITIES.—The Supreme Court of the United States has unanimously affirmed the right of banks to sell collaterals deposited as security for a loan, when the loan is not paid, and to apply the proceeds in payment of the indebtedness. The case was that of *Hayward*, appellant, and *The Eliot National Bank* respondent, an appeal from the Circuit Court of the United States for the District of Massachusetts. The Court applied the rule with the less hesitation owing to the fact that the person depositing such securities had notice of the contemplated sale, and knowledge that the sale had

been made, and yet made no objection thereto, nor attempt to redeem for a long time.

DOMICILE.—In *Herdman's Appeal*, 5 W. N. Cas. 347, the Supreme Court of Pennsylvania passes upon the question of domicile. The definition of Vattel that a domicile is a fixed place of residence with an intention of always remaining there is said to be too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of a domicile. The definition best adapted to our habits is that it is that place in which a person has fixed his habitation without any present intention of removing therefrom. In this case a decedent, a bachelor who was born in another State and lived there until 1871, sold all his land there, and taking his moveable property with him, went to live with his brother-in-law in Pennsylvania, where he remained until the time of his death in June, 1872. When he went to Pennsylvania he told his brother-in-law that he intended to buy another farm in the State he came from, and that he wished to remain with his brother-in-law until he could suit himself. He refused to be assessed for taxation in Pennsylvania, saying that he did not wish to become a citizen of that State. He, however, made no purchase of land in the other State. The court held, however, that the decedent had a domicile in Pennsylvania, and that his property must be distributed according to the law of that State. The court says that a mere intention to remove permanently without an actual removal, works no change of domicile nor does a mere removal from the State, without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the State in which he has lived, takes his movable property with him, and establishes his home in another State, such acts *prima facie* prove a change of domicile. Vague and uncertain evidence cannot remove the legal presumption thus created. The case follows *Abington v. North Bridgewater*, 23 Pick. 170, where it is said, that "it depends not upon proving particular facts, but whether all the acts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." See, also *Wilbraham v. Ludlow*, 99 Mass. 587; *Harris v. Firth*, 4 Cranch, 710; *North Yarmouth v. West Gardiner*, 58 Me. 207 4 Am. Rep. 279.—*Albany Law Journal*.

The Legal News.

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TESTIMONY OF EXPERTS.

On page 57, *ante*, reference is made to the decision of the Supreme Court of Alabama, in the case of *Ex parte Dement*, holding that physicians may be called as witnesses and compelled to give professional opinions, without receiving any remuneration therefor. There seems to be something extremely unjust in forcing a professional man to apply the knowledge gained at the cost of much toil and self-sacrifice, without allowing him any compensation, and it will be seen by reference to page 57, that the authorities are not uniform on the subject. The more equitable rule seems to be laid down in *Webb v. Page*, 1 Carr. & Kirw., 23, distinguishing between the case of a man who sees a fact and is called to prove it in a court of justice; and that of a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant from the nature of his employment in life. Such is the opinion enunciated by the Supreme Court of Indiana in a more recent case than *Ex parte Dement*—that of *Buchman v. The State*. On the trial of one Hamilton for rape, Dr. Buchman, a physician, being called, was asked "whether, in female menstruation, there is not sometimes a partial retention of the menses after the main flow has ceased." Refusing to answer this, or any other question depending on his professional knowledge, without being first paid as for a professional opinion, he was committed for contempt. From this judgment he appealed to the Supreme Court, where the decision was reversed and the commitment set aside. The court referred specially to the case of *Ex parte Dement*, among others, but did not consider the decision a sound one. "It is unnecessary to determine in this case," remarked one of the judges, "whether all classes of experts can require payment before giving their opinions as such. It is sufficient to say, that physicians and surgeons, whose opinions are valuable to them as a source of their income and livelihood, cannot be compelled to perform service by giving such opinions in a court of justice without payment." This was not

the first case of the kind in Indiana. The Court held *Blythe v. The State*, 4 Ind. 525, to be exactly in point on principle. In that case, Blythe, an attorney of the court, had been appointed to defend a pauper on a criminal charge. Declining to render the service without compensation, he was committed for contempt. The Supreme Court, however, held that he was not bound to perform the service gratuitously, on the ground that to hold otherwise would be to subject a particular class to a tax, in violation of the constitution, which provides for a uniform rate of assessment upon all citizens.

The reluctance to provide for the payment of professional witnesses, may arise from the difficulty of assessing the value of such services. The time of professional men varies immensely in value, and it is impossible for the law to fix a compensation that shall be equitable in all cases, but this is hardly a satisfactory reason for failing to make any attempt at rendering justice to professional witnesses under such circumstances.

APPROPRIATION OF PAYMENTS.

The decision of the Privy Council in the case of *Kershaw & Kirkpatrick et al.*, an appeal from the Court of Queen's Bench of the Province of Quebec, though turning in some measure upon matters of fact, touches a point of great interest in the rapid transaction of commercial business. The defendant, Kershaw, was a broker of Montreal, who had been employed by one Stevenson to buy two cargoes of wheat on his behalf. The wheat was bought from different parties, and Stevenson received separate invoices for the cargoes. Kershaw afterwards sent his clerk to Stevenson's office, to request payment, or to get as much money as he could on account of the indebtedness. Stevenson could only spare \$8000, and on handing the clerk a check for that amount, the clerk (as he said, by accident), acknowledged receipt on the invoice for the cargo secondly purchased from the defendants, Kirkpatrick & Co. When Kershaw became aware of this, he endeavored to get the appropriation altered, but Stevenson declined to make any change. Stevenson having become insolvent, Kirkpatrick & Co. sued Kershaw for the \$8000 and were successful. This judgment has been confirmed in England. Their Lordships adopt

the *motif* of the judgment in the Canadian Courts, that the imputation was made by the parties at the time the receipt was given, the intention of the debtor was thereby declared, and it could not be impugned by the other party, more particularly as he had contented himself with pleading the general issue, without specifically alleging change of appropriation. It may be mentioned that Kirkpatrick, before suing Kershaw, endeavored to collect his claim from Stevenson, and actually got \$4000, which, with the \$8000, made more than the amount of his claim, but the Courts did not attach any special importance to this fact.

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, June 28, 1878.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From S. C., Montreal.

LORANGER v. CLEMENT.

Lease—Insolvency of Lessee.

1. An action to rescind a lease may be brought against a lessee who has become insolvent during the term of the lease.

2. A writing signed by the lessor, not accepted by the lessee, promising that a new lease should be entered into after a certain date, did not constitute a new contract of lease which could be pleaded in defence to an action to rescind the original lease.

JOHNSON, J. The judgment before us for review set aside a lease made by the plaintiff *es qualiti* to the defendant of the 5th Oct., 1876, for six years from 1st May, 1877. The defendant became insolvent in October, 1877. The rent was \$700 a year, payable quarterly, and in March, 1878, when three quarters, rent were overdue, besides assessments, the plaintiff sued him to annul the lease, and get the back rent, and also the quarter then current, and payable 1st May. The defendant pleaded by a demurrer, and also by exception, that the action ought to have been brought against the assignee of his insolvent estate. This pretention in both forms was overruled, and we think rightly.

He then pleaded that the lease was an emphyteotic lease, which we also think was untenable.

Further he set up that on the 29th October, after the insolvency, the plaintiff had signed a writing promising a discharge from rent past or future, and gave him the gratuitous enjoy-

ment of part of the ground floor up to May 1878, when a new lease should be entered into. This writing is produced and is admitted; and it says the defendant is to rescind the lease whenever required. This was a proposition that was never accepted by the defendant—who never signed the writing at all—but thought to have all the benefit of it, and assume nothing. But even if it had been accepted, can it be said that the contemplation of a new lease between the parties constituted a new contract of lease? for how long? at what rent? We see no reason for disturbing the judgment, and it is confirmed.

L. O. Loranger for plaintiff.

A. Mathieu for defendant.

JOHNSON, TORRANCE, DUNKIN, JJ.

DEGUIRE v. MARCHEAND.

[From S. C., Montreal.

Lessor and Lessee—Changes made by Tenant.

Where one of several tenants painted the entire front of the leased building a conspicuous red color, and the defendant, who leased the upper flats, and to whom this color was offensive, covered over the red with a neutral tint, *held*, that the lessor had no ground of rescision against the latter on account of the change.

JOHNSON, J. We all concur in confirming this judgment. It was a case of suburban notoriety. The plaintiff sued the defendant, who had leased the two upper stories of his house, to have the lease rescinded. The grounds alleged for the action were deterioration of the premises, and alteration without express permission in writing of the landlord—as stipulated in the lease. These alterations that were complained of consisted in a hole pierced in the roof, and in having painted the front of the house a grey colour. The plaintiff had another tenant named Pelletier on the ground floor of this house, and he says he got permission from the defendant for this man Pelletier to paint the upper stories red—which was done. There is evidently a mistake in the declaration in this respect—saying that Pelletier had the apartments above the plaintiffs instead of below; but that is nothing, the case having been treated by the parties according to the facts as they are. Pelletier had the lower storey as a shop and painted the outside red, extending this rather *prononcé* color over the upper stories too. The defendant's boarders seem to have

objected to this; and the defendant herself also, and required the other tenant to moderate the extreme brightness of his favorite color, but in vain, and at last proceeded to put on a preparatory coat of a sober hue, and in doing so broke a gas pipe.

The view taken by the court below was that the plaintiff had no substantial cause of action: that he used the trifling prettexts referred to for the purpose of favoring one tenant at the expense of the other: that there is no proof of permission to the ground floor tenant to indulge his extravagant passion for scarlet at the expense of the lady up-stairs: and in fact that substantial justice required that this case should be treated as one in which the plaintiff had no reasonable cause of complaint—and we all sustain that view.

J. E. Robidoux for plaintiff.

Longpre & Co. for defendant.

MACKAY, TORRANCE, DORION, J.J.

DANSEREAU v. ARCHAMBAULT et al.

[From S. C., Montreal.

Service—Husband and Wife séparés de biens.

In a joint and several action against man and wife, separate as to property, service of one copy of the writ and declaration is insufficient.

The defendants, man and wife, separate as to property but living together, were sued jointly and severally, and only one copy of the process was served upon them, under Art. 67 of the C. C. P.

The defendants filed an exception to the form, setting up defective service upon several grounds, but issue was ultimately joined on the pretension of the defendants, that a copy should have been left for each.

TASCHEREAU, J., in the Practice Court, maintained this pretension, and this judgment was subsequently confirmed in Review, MACKAY, J., presiding.

C. H. Stephens for plaintiff.

Archambault & David for defendants.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

PLESSIS-dit BELAIR v. LAJOIE.

Insolvency—Action to compel Assignee to take up Instance.

Held, that an assignee cannot be compelled to

take up the instance in a suit pending against the insolvent.

JOHNSON, J. The plaintiff brought an action in this court against one Pratt and his wife, who appeared and pleaded, and afterwards became insolvent—the present defendant being named assignee to their estate; and the action is to compel him to take up the *instance*. The point is not, as the defendant put it, whether an action can be continued against an insolvent: of course it can, and it becomes a mere risk as to costs—that is all that the cases cited go to show. But can an assignee be compelled to take up the instance? That is the point. I can see nothing in the statute or in the reason of the thing to enable me to say that he can be compelled. It was said that the point had been settled in the other court, but I have not been able to get at that. The 39th section of the Act certainly gives power to the assignee to take *all proceedings for the benefit* of the estate both in suing, and defending suits; but that is not obligatory. Action must be dismissed.

Bonin for plaintiff.

Archambault & Co. for defendant.

BROWN et al. v. ARCHIBALD et al.

Promissory Note—Personal liability of Agents signing Notes.

Where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to Estate C. D. Edwards" after their signatures, *held*, that they were personally liable.

JOHNSON, J. The action of the plaintiffs here is against the makers of five promissory notes, signed by the defendants in favor of Charles D. Edwards, and endorsed by him to the present holders. The pleas were that Edwards had become insolvent and had made an assignment to Perkins, and afterwards made a deed of composition with his creditors under which the defendants were made trustees of the estate while he himself carried on the business; but being unable to meet the terms of his composition, the official assignee retook the estate; and that the defendants were called upon by Edwards to sign these notes to enable him to get coal that he had bought from the plaintiff, and signed them as trustees, and so limited their liability. The plaintiff answers that the notes were signed with the express understanding of

a personal liability of the defendants, and without which the coal would not have been delivered. There are two points : 1. As to the personal liability of the defendants, under the general rule—they having put the words "Trustees Estate C. D. Edwards" after their signatures; and, 2. Was there any express understanding. Both points depend on the proof, as, no doubt, there may be circumstances that would exempt them from personal liability, and there might also be an express understanding. The question is not new, and according to the current of authority, turns upon distinctions that are sometimes extremely faint. The general principle is that there is personal liability, unless distinctly excluded. In a case of *Rocher v. Leprohon*, in September 1876—in Review, it was held by the majority of the court, that there was personal liability, even where the debtor gave a tolerably distinct notice that he intended there should be none. It was the case of a registrar suing a returning officer for the price of work in furnishing election lists, and the returning officer had written to him to get the list, and said: "I require in my capacity of returning officer, &c." I thought there, there was a plain notice of the capacity in which he acted, and in which the other consented to treat with him; and I differed from the Court. A more recent case is that of *Brown v. Kerr*, where the defendant signed "R. Kerr, as president of the Montreal Omnibus Company." In that case Mr. Justice Rainville held there was no personal undertaking. That judgment was, however, reversed in Review—and is now before the Queen's Bench. That was an undertaking by which Kerr had agreed to settle an account, in order to prevent the property of the company (of which he was president) from being seized, and the plaintiff had abstained from legal proceedings, and the property had been sold through the instrumentality of the defendant, and on that ground the case was decided against him in review. The cases are very numerous in this country and in England on this subject: the latter are all to be found abbreviated at p. 102, Shelford's digest of case law of joint stock companies, under the head of liability of agents signing negotiable instruments.

Courtald v. Sanders, 15 W. R. 906, is cited as giving the test, which is, that "the agent is bound personally, unless on the face of the instru-

"ment which evidences the contract, the signature appears to be on behalf of the company." It is there said that the cases on this subject are somewhat conflicting, and no doubt they are, and will continue to be, under the great variety of circumstances constantly arising in the course of business, and under the different aspect of facts presented to different minds; for, after all, this is mainly a question of fact; and no doubt Mr. Shelford is quite right in saying, that in many instances, persons have been held liable contrary to their intentions; and probably to obviate this, a provision was inserted in the Companies' Act in England with respect to notes and bills of exchange—in language which, however, has been held to do nothing more than express what the law was before. In the present case, what was meant as between all the parties to the notes may be considered with reference to the deed under which the defendants were acting. It was a deed to which Edwards was party of the first part; his creditors parties of the second part—the defendants made trustees of the third part, and Perkins, assignee, binding himself to give up the estate to them, of the fourth part. Edwards gave notes running over thirty-six months to his creditors, who were to discharge him if the notes were paid; and the defendants were to superintend merely, and the debtor, until the last note was paid, was to carry on the business under the supervision and control of these gentlemen who were to re-assign to him what they had received from Perkins as soon as the notes should be paid. The cases of *Redpath v. Wigf*, 1 L. R. Ex. 335, and *Easterbrook et al. v. Barker et al.*, 6 L. R. C. P., do not directly apply. In the first, the signature was "for so and so" (the debtor), and in the second there was no undertaking at all by the trustees, and the question was only whether the debtor could pledge their credit. The plaintiff is proved to have asked Edwards to get the notes signed by his trustees. He probably knew, therefore, of this arrangement, and that Edwards had divested himself of his estate, and that the defendants had it for the benefit of the creditors. I do not see how he could be supposed to ask them to bind Edwards' estate, already belonging to the creditors, and held by the defendants in trust for them. They had no power given to them by the deed to draw or accept bills. The mere mention of the

fact that they were trustees could not of course by itself make their contract. In that capacity. As creditors of Edwards they had a personal interest in the success of his business, and I think they must be held to have contracted personally. The plea is therefore dismissed, and plaintiff has judgment.

Abbott & Co., for plaintiff.

Kerr & Co., for defendants.

Rhodes v. Starnes et al.—In our last issue it should have been mentioned in our report, that Messrs. *Kerr & Carter* appeared for the defendant, Jas. O'Brien.

DISPUTED QUESTIONS OF CRIMINAL LAW.

(Concluded from page 324.)

IV. Defendants as Witnesses for themselves.—

Mr. Evelyn Ashley, a son of Lord Shaftesbury, has succeeded in carrying to a second reading in the House of Commons a bill to enable defendants in criminal cases to testify for themselves. The bill is substantially the same with those now in force in most of the states in this country, and contains the proviso, so familiar to ourselves, that "the neglect or refusal of any prisoner or defendant at any trial to give evidence under the provisions of this act shall not create any presumption against him, nor shall reference be made to, or any comment made upon, such neglect or refusal during such trial."

The bill was advocated, as we learn from the London *Law Times* of April 18, 1878, by Sir Henry James, an eminent counsel, who said, speaking of defendants on trial: "But, if they were not guilty, could there be any greater injustice than saying to them, 'You are innocent; you can clear yourself if you are allowed to speak, but the law says it would not be just for you to have an opportunity of clearing yourself, and, therefore, you cannot be heard.' " And, again: "He could not conceive any more natural desire on the part of an innocent man than that he should stand face to face with his accusers—not with his tongue tied, for there could be no greater injustice to him than to compel him to be silent. Why should he not be allowed to speak when he stood in peril of life, liberty, and property?

There could be no benefit to the innocent man in forbidding him to speak."

The bill, however, is vigorously opposed in the *Law Times* by a contributor who argues that the right to make a statement to the jury already belongs to a defendant on trial, and that to put him on his oath does not add to the credibility of his statement, or in any way enhance the weight of what he says. *R. v. Malings*, 8 C. & P. 242, is cited as establishing the defendant's right to make such a statement. This objection to the bill, however, is of little weight. Even if a right by the defendant to make a statement to the jury be recognized in principle, it is a right which defendants rarely avail themselves of, for two obvious reasons: In the first place, a statement made by a party who does not subject himself to cross-examination has little logical weight. In the second place, such statement, not being under oath, is not evidence, and is so treated on trial. Counsel for the prosecution tell the jury that the statement is not evidence, and the judge sustains the position, and the jury brush aside the statement as not entitled to affect their deliberations. Hence it is that the right, if it exists, has fallen into disuse.

More serious are the remaining objections made by the writer in the *Law Times*. The clause in the statute requiring that no presumption should be raised against the defendant for declining to present himself as a witness is, it is argued, absurd. "Were it not," so it is said, "that the subject is a most serious one, we should be inclined to smile at the perfect absurdity of such a provision. If a man has an opportunity of denying, upon his oath, the truth of a charge made against him, and does not avail himself of it, how in the name of common sense can a jury be restrained from presuming against him? They would naturally say: 'This man does not venture to swear that he is innocent; he must, therefore, be guilty.' An act of Parliament can effectually deal with legal presumptions, but it is out of its power to regulate moral presumptions."

We have had the same difficulties in the United States, and in several states it has been proclaimed that presumptions arising from the defendant's failure to testify are instinctive mental processes which it is beyond the power of legislatures or courts to control. See *The*

State v. Ober, 52 N. H. 459; *The State v. Lawrence*, 57 Me. 574; *The State v. Bartlett*, 55 Me. 200; *Calkins v. The State*, 18 Ohio St. 366.

Yet, on the other hand, it is possible for a court to stop any reference to such a presumption on the part of counsel, and to leave the case to the jury, with instructions that they are to be governed solely by the evidence produced in the case, putting the question in such a way that the jury will feel themselves thus limited. And of this we have several emphatic illustrations. See *The State v. Cameron*, 40 Vt. 555; *McKensie v. The State*, 26 Ark. 334; *Crandell v. The People*, 2 Lans. 309; *Knowles v. The People*, 15 Mich. 408.

The same objection that is made to the statute now before us might be made to statutes enabling defendants in criminal cases to take depositions of absent witnesses, or to have a change of venue in case of public prejudice against them at the place where the indictment is found. It would be no valid objection to the passage of these statutes that they would subject the defendant, in case he should not avail himself of their privileges, to the presumption that, if he had taken the depositions of witnesses who were absent, these depositions would have told against him; or that, if he had obtained a change of venue, the public horror at his guilt would pursue him wherever he was tried.

The remaining objection is put as follows: "Assuming, however, that he elects to give evidence upon oath, the prosecuting counsel will have a perfect right to cross-examine him to the fullest, and the accused will be bound to answer—however, by doing so, he may criminate himself; and in this way we shall have, in all its most objectionable forms, the odious and un-English system of interrogating prisoners. In the hands of a skilful prosecuting counsel, the most innocent man might fare exceedingly bad, and, by incomplete answers to craftily-put questions, may compromise himself to a most serious degree. Under such circumstances it is not likely that even the perfectly innocent will venture to give evidence upon oath, the more especially when he knows that by giving such evidence he will confer upon the prosecuting counsel a right of reply."

That a defendant, on becoming a witness, cannot shield himself on the ground of self-

crimination, on his cross-examination, has been abundantly settled in the United States. See *the State v. Ober*, 52 N. H. 459; *The Commonwealth v. Lannan*, 13 Allen, 563; *The Commonwealth v. Morgan*, 114 Mass. 255; *Connors v. The People*, 50 N. Y. 240; *The State v. Harrington*, 12 Nev. 125, and other cases cited in *Whart. on Ev.*, sec. 484.

So far, however, from the rulings in this respect driving defendants from the witness-box, the cases are now very rare in which defendants do not avail themselves of the privilege the statute gives, notorious as are the drawbacks thus imposed upon the privilege. Nor, after all, are these drawbacks such as seriously interfere with the eliciting of truth. A defendant, for instance, who sets up a false *alibi* in his own testimony is likely to be caught; but so is a defendant who undertakes to prove a false *alibi* by the testimony of others. There is this, however, in his favor when he is himself on the stand: he is not likely, if his cause be good, to be injured to the extent he is likely to be, if his case rests on the testimony of friends who, with an imperfect knowledge of the facts, are led by their zeal to testify more than they know. If he be innocent, and answers fully to questions put to him, cross-examination, the more thorough it is, will the more thoroughly exhibit his consistency. If he is fabricating a defence, it is right that the explosion of his fabrication should tell against him. It may be said that an innocent man will, in his desperation, fabricate a defence when put on the witness-stand. But innocent men are equally likely to connive at the fabrication of defences by witnesses or counsel; yet this is no reason why defendants should be precluded from having counsel or calling witnesses. Aside from these views, there are points in a defence (*e. g.*, the defendant's impression, in a homicide case, of the danger of an attack), as to which the defendant is the only person from whom the facts are to be obtained. It is a narrow rule which would prevent such a witness from being examined if he offer himself for examination.

So far as concerns the United States, we cannot study the reports of trials which have taken place since the rehabilitating statutes, without seeing that these statutes in the main conduce to promote public justice by enabling each case to be determined more fully on its merits.

The chances of the conviction of the innocent have been greatly diminished, while those of the conviction of the guilty have certainly not been decreased.—FRANCIS WHARTON, in *Southern Law Review*, (June, 1878).

TRIAL BY JURY.

This is a subject on which much nonsense is spoken and written. Trial by jury has the advantage of immemorial usage upon its side. The freest, most civilized, and advanced nations—England and America—have jealously guarded it as an effectual defence and protection of their civil rights. Their example has been followed, in the criminal department of law at least, by other enlightened nations as fast as they have broken the chains of tyranny, prejudice, or ignorance. But, of late, there has sprung up in this country a wide-spread disposition—and that, too, in the minds of many of the best informed—to question, and even deny, the utility and sense of continuing the jury system in civil cases, although they freely admit that it is the best system yet devised for the trial of criminal cases.

They say there is no magic in a name. A system which may be efficient, and which may have acquired renown, when applied in one mode, may, when regarded in another light, and applied in other circumstances to a different state of things, be productive of inconvenience, uncertainty, injustice, and ruin. That the system has been found beneficial in criminal trials is not conclusive as to its fitness for all trials whatsoever. They represent that our criminal jurisprudence is simple; that it is learned without protracted study; that it forms but a little part of professional education; and what the gentlemen of the law treat with such easy indifference, it would not be difficult for an unlettered jury, under the direction of a judge, to comprehend and apply. The fact to be ascertained is generally divested of those complicated matters which create all the difficulty in the determination of the matters of civil right. A crime has been committed, and the proof adduced to bring home the guilt of the accused is in few cases beyond the understanding of a jury. The nature of the trial excites their interest and enlivens their attention; the mode of procedure is calculated to enlighten even the dullest, and the high

responsibility which humanity feels at issuing an award of life or death removes a criminal trial beyond the reach of considerations which must decide the competency of juries for the settlement of matters civil. A nation tenacious of its liberties could not, moreover, in political cases, endure that these should be annihilated without the free consent of the citizens by whom they were secured. Judges, elevated above their position in society, might have no sympathy with the motives that actuated the accused, but which found a welcome reception in the hearts of his fellow-citizens. In all countries judges are generally the organs of the government, though less so in the United States than elsewhere; and the jealousy with which their proceedings are regarded has found too just a foundation in the frequency with which their powers have been abused. To give them the power of deciding on the guilt of criminals would prove detrimental to the well-being of society, by shaking public confidence in the officers by whom its peace is to be preserved. On subjects of great public interest, where popular excitement has taken the reins from reason, and popular passion has created indifference to consequences, it would stimulate insurrection, or create suspicion, anarchy, and discontent, were such excesses checked but by the people themselves. In short, to impose this duty on the judges would be to dig the grave of the purest virtue, which would inevitably sink beneath the malignity of popular detraction.

It is claimed that in criminal justice the simplicity of the procedure, the general simplicity of the fact to be tried, and the general principles of justice tempered with humanity which ought to guide the decision, render the rude judgment by twelve unlettered men fit enough for serving the object of criminal justice. That an erroneous verdict here is not fraught with such gross oppression as in a civil matter; society is the opposing litigant to the accused; its broad and ample shoulders can well bear that one unprincipled adventurer should be let loose for a little longer to weigh upon them—to add an additional wrong to those which a stupid jury has let pass unpunished—consoling itself with the reflection that it is better it should be so than have an after-resurrection of repentance,

on proof of the innocent being condemned. That a rough and sound verdict of this kind does not, indeed, in any case defeat the object of the trial. Though the punishment which the law imposes as a consequence of a verdict of guilty cannot follow, yet the accused cannot retire from his long interview with the judicial authorities unaffected by the narrow escape which he has had; and the solemnity of the trial operates often as much in the way of example as the horror of the execution.

But the same persons who agree in the views just expressed, and urge the expediency, and even necessity, of a jury in criminal trials, at once deny that they have any meaning or application in regard to civil cases. Here, they say, the jury in favouring A do injustice to B, and, while an approximation to a correct judgment on the evidence is all that is required of a criminal jury—their leaning, it is supposed, being to mercy—it is essential in civil cases, to avoid rendering the whole proceeding a very mockery, and the verdict of the jury a libel upon justice, to weigh in the nicest scales the whole circumstances of the case, to its minutest particular; to subject the law to crude notions of justice, or the rules of evidence to the fanciful presumptions from character or preconceived opinions.

It cannot be denied that plausible arguments may be urged against the fitness of a jury to determine the intricate questions that often arise in civil actions. Nor will it be thought a sufficient answer to say that the system has in this and the mother country antiquity to recommend it. We live in times when this plea is treated with small respect. A better reason for the continuance of an institution must be given than that it has been handed down to us by our forefathers, although this alone ought to raise a presumption in its favor, and throw upon an opponent the burden of proving his objection.

"When the English adopted trial by jury, they were a semi-barbarous people; they have since become one of the most enlightened nations of the earth, and their attachment to this institution seems to have increased with their increasing cultivation. They have emigrated and colonized every part of the habitable globe; some have formed colonies, others independent states; the mother country has maintained its monarchical constitution; many of its offspring have founded powerful republics; but everywhere they have

boasted of the privilege of the trial by jury. They have established it, or hastened to re-establish it, in all their settlements. A judicial institution which thus obtains the suffrages of a great people for so long a series of ages, which is zealously reproduced at every stage of civilization, in all the climates of the earth, and under every form of human government, cannot be contrary to the spirit of justice."

In his great work, "Democracy in America," M. De Tocqueville thus speaks of trial by jury in civil causes:

"The institution of the jury, if confined to criminal causes, is always in danger; but, when once it is introduced in civil proceedings, it defies the aggressions of time and man. If it had been as easy to remove the jury from the manners as from the laws of England, it would have perished under the Tudors; and the civil jury did in reality, at that period, save the liberties of England. In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for, whilst the number of persons who have reason to apprehend a criminal prosecution is small, every one is liable to have a law suit. The jury teaches every man not to recoil before the responsibility of his own action, and impresses him with that manly confidence without which no political virtue can exist. It invests every citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society."

He moreover claims that it is a great instru-

ment for the education of the people: that it contributes powerfully to form the judgment and increase the natural intelligence of the people. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes particularly acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even 'by the passions of the parties; that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.

These are weighty reasons in favor of the jury system. And they are borne out by the advancement and experience of other nations. The Danish Jurist, Repp, well expresses his views when he says: "All modern nations, (European and American at least), in so far as they dare express their political opinions, though disagreeing in many other points in politics, seem to agree in this: that they consider trial by jury as a *palladium*, which, lost or won, will draw the liberty of the subject along with it. In the many constitutions which have been projected or established in the nineteenth century, most other things were dissimilar and local; this alone was a vital point, a *punctum saliens*, from which it was expected that the whole fabric of a liberal constitution would be spontaneously dated." And, in all revolutionary movements in the nations of the continent, this mode of trial has been put in the van of their demands.

Trial by jury makes the law plain to the comprehension of, and popular with, the people, whom it most concerns. It was said of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth. And of the civil jury it may also be said that it is an institution which draws the law from the clouds of technicality and abstraction, in which it is prone to hide, and makes it walk upon the earth, and familiarize itself with the unlearned and poor, and teach them, as well as the more favored, the nature and extent of their legal rights and remedies.

The object of all judicial investigation is the discovery of truth. Suppose the jury were abolished; what shall we substitute in its place? Shall we place upon the judge the burden of

deciding both the law and the fact? Forsyth, in his "History of Trial by Jury," says: "To say nothing of the exhaustion of mind which would be felt by a judge called upon in the rapid succession of causes tried at *nisi prius* to weigh contradictory evidence and balance opposing probabilities, although it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its due discharge. Every one has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavorable conclusions from slight circumstances. But each is glad to resort to some general rule by which, in cases of doubt and difficulty, he may be guided. And this is apt to tyrannize over the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amid the realities stranger than fiction that occur, where the springs of action are often so different from what they seem, it is very unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge. These views are just, and will be confirmed by every lawyer of capacity and experience.

But to all this it is often answered, the fault of the jury system consists in this: that it is a system of humbug and, frequently, of perjury. The jury are set apart in a box and told that they are judges. The lawyers address them as judges. The judge addresses them as judges. To be sure, he tells them flatly they must not meddle with the law, and that they must take it from his mouth; but he tells them, also, they are the judges of the fact, although he may probably annul their verdict because they have misjudged the fact. This mode of treating them as judges flatters their vanity, and flatters the vanity of the populace, who are told they are judged by their country—meaning thereby that they are judged by each other; whereas, in reality, their transactions are judged of according to law as expounded by professional lawyers. Some jurymen think themselves judges, occasionally try to judge for themselves, but, oppressed by the law of unanimity, and their own want of experience in business, they are compelled to yield after an ineffectual struggle, and to give way to a majority of their brethren, who usually

obey the direction of the judge. The minority in such cases, it is alleged, are sure to incur the guilt of perjury, and sometimes the whole jury do so. They are sworn to try the cause; but, instead of doing so, which would require a special exercise of judgment in each man, and thereby lead to strife, they retire for safety and ease, to apathy, and wait to hear and obey the opinion of the judge.

All this is wrong, these objectors claim. And they enquire, with a fine show of indignation, Why should the forms of a barbarous age be maintained to the effect of producing deception? Why should not justice be administered under forms consistent with truth and honesty and sound principle, and in such a way that all may understand what is doing—that a man may know under what sort of government he actually lives, what place he holds, and what place other men hold, and what duties they perform to the community? Why should jurymen be puffed up with the notion that they are judges, when so many inventions have been devised to limit and annul their decisions, and have even been rightly and necessarily devised, as all admit who know anything of such proceedings?

It appears to us that all this heat and all these objections come from misconstruction and misunderstanding, wilful or ignorant of the proper province of a jury. They are to decide the controverted facts of a cause, under the law as given them by the judge. If they go contrary to the law, their verdict will be set aside. But, as to the facts, they are the supreme arbiters. If their verdict is against *all* the evidence, the judge will not allow it to stand. But, if it is a question of the weight of evidence, however much there may be on one side, and however little on the other, and whatever the judge's private opinion may be, the conclusion of the jury upon such evidence, in civil causes, must stand.

The trial by jury, then, is in reality a trial by one's peers. England and America were the first countries on earth that, at least in modern times, attained to a perfectly fair administration of justice, while they had a fixed system of law. This is mainly to be ascribed to trial by jury. One great value of a trial by jury consists in the control over judges which it gives to the public. Parties meet each other publicly; each brings forward his evidence publicly. The import of the case on both sides is stated before

the public. The judge conducts the proceedings, and virtually decides the case, in the face of the public. The use of the jury is that the judge cannot decide the cause by merely declaring, in a form of words, that the plaintiff has gained, or the defendant has gained, his cause. A dozen ordinary men have been set apart, by lot, in a box; there they sit; they have heard and seen all that passed, and the judge, by his conduct and decisions during the trial, must satisfy them that he is right. If he fail, they have it in their power, for a time at least, to put a negative upon his judgment.

Most signal benefits result from this. The people are constrained to elect (we believe that the election of judges is a bad system) men experienced in business and learned in the law. An ignorant man in such a situation would never be able to control the lawyers, and would be exposed and run down by public ridicule.

The judge is constrained to act justly. He must act righteously, or encounter infamy and daily discomfiture from the opposition of juries to his opinions. Hence the general impartiality and high reputation of our judges. The Turkish mollahs or cadis are said to yield readily to corruption. Let it be supposed that, when a cause is called, a committee of the surrounding mob were at the same instant called out by lot, and the cadi or judge, after hearing the cause, compelled to convince this committee that the decree pronounced by him is just; it is evident that he would immediately, or from necessity, become a just judge.

Our system is one of law, and not one of caprice. It is correct in that it provides that disputes shall be decided, not by ignorant men, but by the aid of judges learned in the law. Were ordinary persons taken by dozens, by lot, from the mass of mankind, to decide causes without the direction of judges, the country would be without law. Every different jury would have a different opinion concerning the rules of business. In other words, no man would know how to act, because justice would be administered according to no fixed or recorded principles. All the speculations of those men who propose to establish local or popular tribunals, to decide without appeal, are the result of mere ignorance. Civilization cannot make progress unless the principles be fixed and certain according to which transactions are

to be regulated, and principles can only be recorded and adhered to by men who make the study of them the chief business of their lives.

Trial by jury always has been popular with the people, and in spite of all that has been said against it of late years, and in spite of its gross abuse in many instances, it has not only held its ground, but the people have placed it beyond the law-making authority to tamper with it, by embedding it in the constitution of each state. And Judge Cooley, in an article published in the December number of the *American Law Register*, entitled "Some New Aspects of the Right of Trial by Jury," calls attention to the fact that, in several of the states, the legislature has gone beyond the constitution in giving importance to the jury by diminishing the functions of the judge; taking from him entirely the right of assisting and guiding the action of the jury in sifting and weighing evidence, which was an important part of his duty at the common law. The judge is required in these states to confine his charge strictly to a written presentation of the law, and is inhibited from commenting on the facts. This is the case in Missouri. Judge Cooley says: "It does not seem to have occurred to any one to raise the question whether, in preserving the historical right of jury trial, the constitution has not guaranteed the functions of the judge, as well as those of the jury; and whether it was admissible to change the system radically in one particular more than another. . . ."

It is surely a matter of some importance to know whether a judge may be made a cipher in this time-honored tribunal, and whether the agreement of twelve men in a certain conclusion on the facts, however accomplished, is all the constitution aims at." This whole article is well worthy the careful consideration of every lawyer.

While we deprecate encroachment upon, or diminution of, the functions of the judge, rightly understood, as they existed at the common law, we are firm believers in the system of trial by jury in both criminal and civil cases. That it might be modified in some particulars so as to increase its efficiency without in the least impairing the system, we also believe. But it is not the purpose of this paper to discuss this matter. We believe the system the best yet devised by man for the administration of justice.

Taking all things into consideration, it is, as a rule, the best for suitors, the best for the people, the best for judges, and for the profession of the law. Much weight is to be given to the deliberate judgment of a great, brave, thoughtful, intelligent, and progressive people in favor of this system, which they have long tried, which has become more popular the more intelligent and great they have become, which they have found efficient in the administration of justice, and which they declare to be the *palladium* of their liberties. It is only eminent and exalted nations that can thus believe in trial by jury. Where the mental capacity of a nation is mean, or the standard of public morality low, and the obligation of an oath is lightly felt, no worse system could be devised.

For protecting the innocent, the jury system is most effectual. It is very rare that an innocent man is convicted. To say such a catastrophe never happens would be to deny recorded facts. But, before it can happen, the accused has many opportunities to prove himself not guilty. The examining and committing magistrate, the grand jury and petit jury, and the presiding judge must all, in different degrees, have concurred in the result. And this is not all, for the court of appeals, to which the convicted may appeal, stands ready to correct any error that may have been committed in the steps leading to the conviction.

But it cannot with equal truth be asserted, as pointed out by Mr. Forsyth, that juries never acquit in ordinary cases where they ought to condemn. "This is, no doubt, the vulnerable point of the system: that feelings of compassion for the prisoner, or of repugnance to the punishment which the law awards, are sometimes allowed to overpower their sense of duty. They usurp, in such cases, the prerogative of mercy, forgetting that they have sworn to give a true verdict according to the evidence. But it is an error at which humanity need not blush; it springs from one of the purest instincts of our nature, and is a symptom of kindness of heart which, as a national characteristic, is an honour."

That our judges in this country and England are held in higher estimation and honor than in other countries is due, in great part, to the jury system. In deciding upon facts, opinions will necessarily vary, and judges, like other

men, are liable to be mistaken in estimating the effect of evidence. Every one thinks himself competent to express an opinion on a mere question of fact, and would not hesitate to comment freely and with acrimony upon the decision of a judge which, on such a question, happened to be at variance with his own. The judge would incur much odium, and lose much respect, if, in the opinion of the public, he had decided wrong on a matter of fact about which they believed themselves as well able to determine as himself. This kind of attack is now saved him by the intervention of the jury. He merely expounds the law and declares its sentence, and in the performance of this duty, if he does not always escape criticism, he very seldom incurs censure. And it may be said that the tendency of judicial habits is to foster an astuteness which is often unfavorable to the decision of a question upon its merits. No mind feels the force of technicalities so strongly as that of a lawyer. It is the mystery of his craft, which he has taken much pains to learn, and which he is seldom averse to exercise. The jury acts as a constant check upon, and corrective of, that narrow subtlety to which professional lawyers are so prone, and subjects the rules of rigid technicality to be construed by a vigorous common sense.

And DeTocqueville is right when he says, in substance, that the jury, which seems to restrict the rights of the judiciary, does, in reality, consolidate its power; and in no country are the judges so powerful as where the people share their privileges. It is especially by means of the jury, in civil causes, that the American magistrates imbue the lower classes of society with the spirit of their profession. Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.

The members of the legal profession ought to be the last to denounce the jury system, or to wish to see it in any way impaired. They, more than any other class of men, have been the leaders and rulers of the people of this country. They have been enabled to do this by their influence upon the minds of men; and the most abundant source of their authority has been, and is, the civil jury. Through this medium they are in constant intercourse with

the people; and, to their honor be it said, they have, in that intercourse, so impressed the people with their ability, culture, honor, integrity, and fitness to rule, that they have willingly chosen them as their law-makers and rulers.

Of the abuses of the jury system we have not space to speak. Every good citizen is interested in exposing, and crushing them. The *Globe-Democrat* of this city for once deserves well of this whole community for the thorough and fearless manner in which it has made known to the people the abuses of trial by jury in this city. If the other great daily journals of the country would, in a like manner, point out these abuses, and demand their immediate correction, it would be but a short time before they would be entirely reformed. If error, abuse and wrong have crept into the system, the true remedy is, not to abolish it, but to vigorously go about abolishing the error, abuse, and wrong.—*Southern Law Review*, (St. Louis).

GENERAL NOTES.

SOME RECENT CASES.—In vol. 6 of *Daly's Reports*, being reports by the Chief Justice of the Court, of cases argued and determined in the Court of Common Pleas for the city and county of New York, several points of interest occur, among which may be noticed the following:—*Smith v. Reed*, p. 33: A boarding-house keeper was held liable for the loss of a boarder's property by theft, committed by a stranger permitted by a servant, in the employ of the boarding-house keeper, to go into the boarder's room. *Hoffman v. Gallaher*, p. 42: Plaintiff agreed to paint a portrait of defendant, which should be a likeness satisfactory to his friends. In an action for the price of the portrait, held that it was not competent to exhibit the portrait to the jury to enable them to determine if it was a satisfactory likeness. *McGuire v. N. Y. C. & H. R. R. Co.*, p. 70: In an action for personal injuries for negligence, a stipulation by defendant's attorney as a condition for postponement, that the action should not abate if plaintiff died, held valid and enforceable. *Matter of Fincke*, p. 111: The court may summarily order an attorney to pay to his client money collected in a suit, and if the attorney claims a lien for professional services, he is not entitled to a jury to determine his claim.

The Legal News.

VOL. I. JULY 20, 1878. No. 29.

JUDICIAL LIABILITY.

The case of *Lange v. Benedict*, a report of which appears in the present issue, is interesting as a very recent re-examination of the law concerning judges and their liability for judicial acts. Lange had been convicted of an offence for which the punishment prescribed by statute was \$200 fine or one year's imprisonment. The defendant, Judge^s Benedict, presiding at the court, sentenced him to both the fine and imprisonment. Lange paid the fine, and then applied by writ of *habeas corpus* for release from imprisonment. This was a perfectly reasonable and natural course, and it might seem that even the judge who had made the blunder could not find anything in it to object to. But the writ being returned before him while yet holding the term of the court at which the conviction was had, Judge Benedict set aside the former sentence, and re-sentenced the plaintiff to one year's imprisonment. The case was carried to the Supreme Court of the United States, by which the Judge's act was declared to have been without authority of law, and the release of Lange was ordered. By this time the latter seems to have become angry at the treatment to which he had been subjected, and he brought an action against the Judge, setting up the facts of the case, alleging that the act of the Judge was wilful and without authority, and claiming damages for false imprisonment. At the outset his pretensions appear to have met with some favor, for the defendant having demurred to the action, on the ground that he was not liable for the consequences of any act done by him as a judge of a court of general jurisdiction, the demurrer was overruled at Special Term. At the General Term, however, this judgment was reversed and the demurrer sustained, and the N. Y. Court of Appeals, by the judgment reported elsewhere, has affirmed this decision. A judge is, therefore, held to be absolved from the consequences of illegal acts, even wilfully done, and it will be seen by the authorities cited in the judgment that the doctrine is not new.

It will be noticed that the plaintiff did not allege malice on the part of the Judge. Such an allegation, however, under the ruling of the Court, would not prevent the declaration from being demurrable, and we can see no great difference in substance between an illegal act wilfully done, i. e., a wilful abuse of the powers of the court, and an illegal act done with malicious intent. Our contemporary the *Albany Law Journal*, remarks: "Perhaps such a rule is necessary to secure independence to the judiciary; but it would seem that a person injured by a gross abuse of judicial power, such as the act committed by defendant was, should not be remediless." This is true. Under our system, however, the remedy is clear. The terrors of a public impeachment are at the command of the oppressed, and are quite sufficient to make the most obstinate judge listen to reason. But happily the occasion for such a remedy will seldom arise, and certainly it is one which should not be adopted without grave cause.

EVIDENCE OF EXPERTS AS TO FOREIGN LAW.

English judges, in the more recent cases, have looked with some jealousy upon the evidence of experts upon questions of foreign law. One of the leading authorities on the subject is *The Sussex Peerage case*, 11 C. & F. 85, where the House of Lords permitted the late Cardinal Wiseman, as a Roman Catholic bishop and coadjutor to a vicar apostolic in this country, to give evidence as to the matrimonial law of Rome. Lord Langdale based his decision on this ground: "He is engaged in the performance of responsible public duties, and connected with them; and in order to discharge them properly he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge." In *Van Donckt v. Thelluson*, 8 C. B. 812, the Court of Common Pleas allowed the law of Belgium as to a promissory note payable in that country to be proved by a London hotel-keeper, who was a native of Belgium, and had formerly carried on business at Brussels as a merchant and stockbroker. Mr. Justice Maule observed: "Applying one's common sense to the matter, why should not persons who may reasonably be supposed to be ac-

quainted with the subject (though they have not filled any official appointment, such as judge, or advocate, or solicitor) be deemed competent to speak upon it? . . . All persons, I think, who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required." On the other hand, in *Bristow v. Sequeville*, 5 Ex. 275, the Court of Exchequer refused to allow the law of Prussia as to a question of stamp duty to be proved by a witness who had merely studied that law at the University of Leipsic. Mr. Baron Alderson inquired why, if the evidence were admissible, "may not a Frenchman, who has read books relating to Chinese law, prove what the law of China is." This decision was followed not long ago by Sir James Hannen (*In the Goods of Bonelli*, 24 W. R. 255; L. R., 1 P. D. 69), who refused to decide a question of the testamentary law of Italy upon the affidavit of a gentleman who described himself as a "certified special pleader" and "familiar with Italian law," there being nothing to show that his familiarity with the Italian law was obtained otherwise than by studying it in this country. And the same Judge gave a similar decision last week in *Cartwright v. Cartwright and Anderson*, an undefended divorce suit, the marriage between the parties having been celebrated at Montreal. In order to prove the validity of the marriage according to the law of Canada, the counsel for the petitioner called Mr. Bompas, Q.C., who deposed that he was familiar with Canadian law, having practiced for many years in Canadian appeals before the Judicial Committee of the Privy Council, which is the final Court of Appeal for the Dominion of Canada. Sir J. Hannen declined to admit Mr. Bompas' evidence or to hold that an English barrister by practicing before the Privy Council becomes an expert as to any system of law in respect of which the Privy Council may be the final Court of Appeal.—*Solicitors' Journal*.

LEASE, VOID OR VOIDABLE.—In *Davenport v. The Queen*, (London L.T., Feb. 9, 1878, p. 727), *Held*, That a clause in a lease declaring that it shall be void upon a breach of conditions by the lessee, means that it is voidable only at the option of the lessor, even if the condition was imposed by statute.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

MASSÉ V. HOCHELAGA MUTUAL INSURANCE CO.

Insurance Policy—Condition—Waiver.

A condition in a policy of a mutual fire insurance company provided that in case any promissory note for the first payment on any deposit note should remain unpaid for 30 days after it was due, the policy should be void as to claims occurring before payment. *Held*, that the company, accepting a note for such first payment, but acknowledging receipt by the policy as for cash paid, waived the condition.

JOHNSON, J. This is an action to recover the amount of a loss by fire on the 15th August, 1877, under a policy of insurance for three years from the 10th March, upon an engine lathe in a building described in the policy. The plaintiff alleges the execution of the policy, the giving of his deposit note for \$79.24, and the payment of the first assessment on it amounting to \$11.89. Then he alleges the fire, and destruction of the thing insured, and notice of loss. The defendants plead, besides the general issue, two pleas. By the first, they set up the 19th condition of the policy, which provides that in case any promissory note for the first payment on any deposit note shall remain unpaid for thirty days after it is due, the policy shall be void as affects all claims for loss occurring during the time of such non-payment, subject, however, to revival after payment; that the plaintiff gave his deposit note for \$79.24, as alleged, on which a first payment of \$12.05 ought to have been made when the policy issued; but instead of paying that sum in money, the plaintiff gave his note at thirty days, which became due on 12th of April, and remained due at the time of the fire, which was on the 15th of August. Second, the defendants set up the 12th condition of the policy, by which notice of fire and proof of loss are to be made within 30 days after a fire; and they also set up the Provincial Statute of Quebec, 40 Vic. c. 72, sec. 28, which provides for such notice and proofs of claim, and obliges the company within 30 days afterwards to ascertain and determine the amount of loss, and notify the claimant of their determination by a prepaid and registered letter, and makes the amount of loss payable in three months after the receipt

of the proofs: and they say the plaintiff violated both conditions, and also the Statute. The plaintiff makes two special answers: first, that these conditions are no part of the policy, not being in the body of it, but only printed on the back; and that the receipt for the deposit note of \$79, and for the first assessment \$11.89, are conclusive, and a waiver of the condition. By his second special answer he says that the note for \$12.05 was in fact paid on the 15th September, and the risk thereby revived. I am clear that these conditions are part of the contract. The application for insurance makes them so. There is warning given by an express reference to them on the printed endorsement, and the plaintiff, as a member of a mutual company, and both insured and insurer, uses these conditions towards other members, and must be held to them himself.

As to the non-payment of the note given for the 1st assessment, can the Plaintiff prove the note at all in the face of the policy by which this corporation under its seal acknowledges that the Plaintiff "has deposited in the hands of the directors of the Company his note on demand for \$79.42, of which the sum of \$11.89 has been paid to the directors," and further, in the face of their interim receipt that the Plaintiff "has given a deposit note for \$79.24, and made a cash payment thereon of \$11.89."

The evidence was taken under reserve of objection made at the time, and on looking at the case now, I feel no hesitation in ruling out the evidence on that subject. The point is not now, under this first special answer, as to the effect of this 19th condition if it could be legally proved that a promissory note had been given, and was overdue and unpaid at the time of the fire; but whether, when the Defendants themselves acknowledge in writing that the payment was in cash, they can be allowed to prove the reverse of what they have admitted in the contract. The effect of a payment by note is one thing: It may be an absolute payment in certain cases, or it may be defeated by the happening of the condition, *i. e.*, non-payment at maturity: That question is very nicely treated in Benjamin on Sales. c.2, Book IV, on payment and tender; but what I am concerned with now is whether this corporation, confessing under its seal that it has received payment, can be allowed to prove that it has not; and it

would be against all principle to allow that it can. On this point I would merely refer to the collection of authority in Sansum's digest, page 900 et seq., where it will be seen that the point has been over and over again decided in accordance with the Plaintiffs first special answer. Therefore the question raised by the second special answer of the Plaintiff made without waiver of the first, that this note had been paid on the 15th of September, whereby the risk revived, is not reached. There is no violation of the condition No. 19, because the Defendants have waived it by express admission in the contract, which prevents the proof of it.

There remains therefore the question of notice and proof of loss under the twelfth condition. Upon this point I am against the Plaintiff. The notice and proofs required by that condition have not, in my opinion, been given as the parties agreed that they should be given. Notice of loss was to have been given "forthwith" in writing. The only thing in the nature of notice in this case was what is contained in the two papers produced by the Defendants as Exhibits 1 and 2. They are notices by a Mr. Babcock acting, as he says, in his own interest, and in that of the Plaintiff. They were not delivered forthwith—nor even within thirty days. As to proofs of loss, the insured was required to make them within the 30 days—so that the Company could exercise its right within the time, and in the manner stated in the 28th section of the act. The assured seems to have sworn to his loss by attorney: That is to say he never swore to it at all, for his attorney could surely not make oath to facts known only to the principal. Then a Mr. Annett swears to the value; but not the destruction of the thing insured. The object of such a condition, which is evidently to put the insurer in a position, within a reasonable time, to judge of the facts, is obviously frustrated, if this can be held to be a compliance with it. There must be fair play on both sides.

Action dismissed.

Lambe, for the plaintiff.

Lunn & Co., for the defendants.

WILLIAMS v. MONTREAIT.

Discontinuance—Costs—Attorney's Right to proceed for.

Held, that an attorney *ad litem* has a right to continue the suit for the recovery of his costs, though his

client has agreed to discontinue the case without costs—more particularly in a suit by a wife against her husband, when the settlement was obviously made by the defendant with the intention of depriving the attorney of his costs.

JOHNSON, J. By an agreement executed before notary between the parties to this case on the 30th November last, the plaintiff discontinued her action without costs. The defendant now comes before the Court and asks for *acte* of this discontinuance, and of his consent to its terms. There has been no notice to the plaintiff's attorneys of this arrangement, and they cannot be bound by it. Their right is to continue the proceedings for the recovery of their costs, and it was obviously for the purpose of defeating this right that the arrangement was made between the parties without notice to the attorneys. On the general question of the right of parties to transact to the prejudice of the attorneys of record, there is a most unsatisfactory conflict of decisions. I have gone through all the cases; but there is none that goes the length of saying that in a case where the defendant was certainly about to be condemned to pay costs, he can in a clandestine manner get the plaintiff (who is his own wife) to absolve him, and then apply that arrangement so as to oust the attorneys who had fought her battle. On the contrary, while the general question seems pretty evenly balanced in all these decisions, there is a case that stands out from the others as authority that where there is anything exceptional in the defendant's motives, as there clearly was here, he cannot get the benefit of an outside arrangement of this kind to the injury of the attorney. It is the case of *Richards v. Ritchie*, 6 L.C.R., p. 98, in the strongest way condemnatory of the defendant's conduct. The action there was actually dismissed because the plaintiff had been got to sign an admission that he had no ground of action, nevertheless the defendant was condemned to pay the costs. After all, costs are a matter of discretion with the Court, and on the whole, after reading the defendant's deposition, I can come to no other conclusion than to refuse his motion, and the other party asking costs, I grant *acte* of the discontinuance upon payment by defendant of the costs of the action.

Macmaster & Co. for plaintiff.

Judah & Co. for defendant.

RHEAUME V. CAILLE ET VIR.

Obligation by Wife for Husband's Debt.

Held, that an obligation made by a wife to repay money advanced for her husband's use is an absolute nullity, and even a representation by the wife to the lender, that the money was for herself, does not affect the case.

JOHNSON, J. The action is against a married woman, *séparée*, to recover \$1,452.84, principal and interest of four obligations made by her, with her husband's authority, in favor of the Plaintiff. The plea is that the money was not for her benefit, but solely and exclusively for the benefit of her husband who is the Plaintiff's brother. It appears clearly that all this money was paid by the Plaintiff either to the Defendant's husband, or to his creditors directly or indirectly, part of it being devoted to pay a composition he had made with them. The defendant's obligation to repay this money is contrary to law,—and this applies to the whole amount, and not merely to part, as was contended for the plaintiff. It was said that the defendant had herself represented to the lender that the money was for herself; but that is nothing: It is not an *obligation naturelle*; but a *fraude à la loi et à l'ordre public*. See *Marcadé*, art. 1235, No. 670, vol. 4, p. 513. The well known case of *Buckley & Brunelle*, and the authorities cited in that case are directly in point. The action must, in my opinion, be dismissed with costs.

Longpré & Co., for plaintiff.

Jetté & Co., for defendant.

CADIEUX V. CANADIAN MUTUAL FIRE INS. CO.

Saisie-Arrest—Concurrent Writs.

Held, that A., on a judgment against B., has a right to issue a *saisie-arrest* in the hands of C., notwithstanding the fact that *saisie-arrests* have been previously placed in the hands of B. by creditors of A.

JOHNSON, J. The plaintiff issued a writ of *saisie-arrest* after judgment in the hands of Larin and some sixty others. The defendants come in and contest the right of the plaintiff to issue the writ; and they want to urge the transfer by the plaintiff to his brother of a part of the claim he had against the company. They also urge the issuing of three *saisie-arrests* in their hands by creditors of the plaintiff. All this appears to me to have nothing to do with the plaintiff's right to issue his writ, and to

get, the evidence of the garnishees as to whether they have anything in their hands belonging to the defendants. It may have something to do with the question as to whom the money is to go to when we find out whether there is any. The parties made no proof before me as to the identity of the plaintiff in this case with the debtor whose money was seized in the defendant's hands in the other cases, and as far as I can see, if the parties are the same as those mentioned in the papers filed, one of the *caises* in the defendant's hands was discontinued and the declaration made in the two others was never contested, so that there would appear to be very little ground for contesting at all; but certainly nothing to prevent the issuing of the writ, or the garnishees' obedience to it.

Contestation dismissed with costs.

Longpre & Co. for plaintiff.

Lunn & Co. for defendant.

LIABILITY OF JUDGE FOR ERRONEOUS SENTENCE TO IMPRISONMENT.

NEW YORK COURT OF APPEALS,
MARCH 19, 1878.

LANGE V. BERNIOT.

Defendant was United States district judge, and plaintiff was tried at a Circuit Court held by him upon an indictment for embezzling mail bags. The jury found plaintiff guilty, and that the value of the mail bags was less than \$25. The penalty prescribed in such case was a fine of \$200 or imprisonment for one year. Defendant, as judge, sentenced plaintiff to pay a fine of \$200 and be imprisoned for one year. Plaintiff was imprisoned five days and he paid the sum of \$200 to the clerk of the court as a fine, and the same was paid by the clerk to the government. Plaintiff procured a writ of *habeas corpus* which was returned before defendant, who was holding the same term of court at which plaintiff was sentenced. Defendant, upon the return, vacated and set aside the sentence, and as a part of the same judicial act and order, passed judgment anew on plaintiff and re-sentenced him to be imprisoned for the term of one year, and plaintiff was imprisoned. Under proceeding taken by plaintiff for that purpose, to which defendant was not a party, the re-sentence of plaintiff was set aside by the Supreme Court of the United States as being without authority of law. In an action for imprisonment under the re-sentence, brought by plaintiff against defendant, *held*, that the act of defendant was done by him as a judge, and he was protected by his judicial character from the action brought by plaintiff.

FOLGER, J. The plaintiff has brought an action against the defendant for false imprisonment and detention in prison. He alleges that

it was wrongful and wilful, without just cause or provocation. He does not allege that it was malicious or corrupt. The complaint in the action sets out the facts *in extenso*, upon which the plaintiff relies. To this the defendant has demurred, stating three causes of demurrer; but the one cause relied upon is that the complaint does not state facts sufficient to constitute a cause of action. It is well, therefore, to state with some particularity the facts which are alleged, or are conceded.

In October, 1873, the defendant was judge of the District Court, for the United States, of the Eastern District of New York. As such, by virtue of an act of Congress, he presided at and held the Circuit Court of the United States for the Southern District of New York, for the October Term of that year.

The plaintiff was at that time arraigned upon an indictment of twelve counts, the general purport of which was that he had stolen, embezzled, or appropriated to his own use certain mail bags, the property of the United States, of the value of \$25; he was tried upon the indictment; the verdict of the jury was, generally, that the plaintiff was guilty, and that the value of the mail bags was less than \$25.

He was indicted under an act of Congress which declared the offence and affixed the punishment. By that act, if the value of the mail bags taken was found to be less than \$25, the punishment for the offence was a fine of \$200, or imprisonment for one year.

The defendant, sitting as such judge, and holding that court at that term, passed judgment upon the plaintiff and sentenced him to pay a fine of \$200 and to be imprisoned for one year.

It is manifest that the punishment thus imposed was more than that affixed to the offence by the act of Congress.

The plaintiff paid to the clerk of the United States Circuit Court, intending it in full payment of the fine so imposed, the sum of \$200. This was done on the 4th day of November, 1873, and during the same term of the court, and the clerk made certificate that that sum was then on deposit in the registry of that court.

The clerk paid the money into the office of the Assistant Treasurer of the United States in New York city, in that circuit, to the credit of the Treasurer of the United States, as the fine thus imposed.

There is no direct allegation in the complaint that the plaintiff was imprisoned under that sentence. There is an allegation that during the same term of that court a writ of *habeas corpus* was granted and returned into that court in which the imprisonment of the plaintiff was made to appear. It may be taken as conceded, however, that the plaintiff was actually in prison for the space of five days after the pronouncing of that sentence and before further proceedings were had. At the same term of that court, the defendant sitting and holding that court, and as the judge thereof, on the return of that writ, vacated and set aside the sentence above set forth, and at the same time, and as a part of the same judicial act and order, passed judgment anew upon the plaintiff, and resented him to be imprisoned for the term of one year. Under this action of the defendant the plaintiff was imprisoned, which is the alleged wrongful imprisonment and detention of him by the defendant. Judicial proceedings were afterwards had on behalf of the plaintiff, the end of which was that the Supreme Court of the United States adjudged the resentence above stated to have been pronounced without authority, and discharged the plaintiff from his imprisonment. It does not appear that the defendant was a party to the proceedings in the Supreme Court, or was heard or represented there.

On this state of facts the plaintiff insists that the defendant is liable to him in damages.

The defendant claims that the facts show, that all which he did he did as a United States judge, and that the judicial character in which he acted protects him from personal responsibility.

In our judgment the question between the parties is brought to what, in words at least, is a very narrow issue. Did the defendant impose the second sentence as a judge; or, although he was at the moment, of right, on the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond, or in excess of, the jurisdiction which he then had as a judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not to be easily determined to the satisfaction of a cautious inquirer.

The plaintiff makes a preliminary point, that inasmuch as the complaint avers that the

defendant wrongfully and wilfully and without jurisdiction falsely imprisoned the plaintiff; that, therefore, as a technical rule of pleading, the demurrer having admitted the allegations of the complaint, there must be judgment for the plaintiff. But the complaint does not rest satisfied with that general allegation. It rests the general allegation upon the special circumstances afterward set forth in it, and which are made up of all, or nearly all, the facts which we have above recited. So we have to consider them as well as the general allegation, and to treat the general allegation as no broader or more effectual than the special circumstances upon which the complaint rests it.

There are not many topics in the law which have received more discussion or consideration than that of the liability of a person holding a judicial, or *quasi* judicial office, to an action at law for an act done by him while at the same time exercising his office. The principles which should govern such action are, therefore, well settled. The difficulty in satisfactorily disposing of a particular case is not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie. The general rule, which applies to all such cases, and which is to be observed in this, has been in olden time stated thus: Such as are by law made judges of another shall not be criminally accused, or made liable to an action for what they do as judges; to which the Year Books (43 Edw. III, 9; 9 Edw. IV, 3) are cited in *Floyd v. Baker*, 12 Coke, 26. The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge, the proceeding is as nothing. *Perkins v. Proctor*, 2 Wils. 382-4, citing the *Marshalsea case*, 10 Coke, 65-76, which says: "Where he has no jurisdiction, *non est iudex*." It has been stated thus, also: No action will lie against a judge acting in a judicial capacity for any errors he may commit in a matter within his jurisdiction. *Gwynne v. Pool*, Lutw. 937-1160. It has been, in modern days, carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. *Brodley v. Fisher*, 13 Wall. 351.

It is to be seen that in these different modes of stating the principle there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity, it must have been a judicial act. So it always remains to be determined, when is an act done as judge in a judicial capacity.

And this is the difficulty which has most often been found in the use of this rule, and which is present here : to determine when the facts exist which call into play that qualification. For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander to be stricken off, and be obeyed, he would be liable. Thus, a person in the office of judge of the Ecclesiastical Court in England, excommunicated one for refusing to obey an order made by him, that he become guardian *ad litem* for an infant son ; and though the order was made in a matter then lawfully before the court for adjudication, and of which he, as judge, had jurisdiction, he was held liable to an action. *Beaurein v. Sir William Scott*, 3 Campb. 388. He had not, as judge, jurisdiction of the person to whom he addressed the order. On the other hand, one rightfully holding a court for the trial of a criminal action, fined and imprisoned a juror, for that he did not bring in a verdict of guilty, against one on trial for an offence, after the court had directed the jury that such a verdict was according to the law and the facts. The juror was discharged from his imprisonment on *habeas corpus* brought in his behalf ; and it was held that the act of fining and imprisoning him was unlawful, inasmuch as there was no allegation of corruption, or like bad conduct against the juror. The juror then brought action against him who sat as judge and made the order for the fine and imprisonment, but took nothing thereby ; for it was held that the judge acted judicially, as judge, as he had jurisdiction of the person of the juror, and jurisdiction of the subject-matter, to wit : the matter of punishing jurors for misbehavior as such ; and that his judgment, that the facts of the case warranted him in inflicting punishment, was a judicial error to be avoided and set aside in due course of legal proceedings, for which, however, he

was not personally liable. *Hammond v. Howell*, *Recorder of London*, 2 Mod. 218 ; *Bushe's Case*, Vaughan, 135. So, a judge of Oyer and Terminer was protected from indictment, when he had made entry of record that some were indicted for felony before him, whereas, in fact, they were indicted for trespass only. 12 Coke, 25.

Thus it appears that the test is not alone that the act is done while having on the judicial character and capacity ; nor yet is it alone that the act is not lawful.

We have seen, too, that the test is not, that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly ; for even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority. *Bradley v. Fisher*, *supra*.

We think it clear that there is no liability to civil action if the act was done, "in a matter within his jurisdiction," to use the words of *Gwynn v. Pool*, *supra*. Those words mean, that when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in *Hunt v. Hunt*, decided 29th January, 1878. It is not confined within the particular facts which must be shown before a court or a judge to make out a specific and immediate cause of action ; it is as extensive as the general or abstract question which falls within the power of the tribunal or officer to act concerning. Our idea will be illustrated by a reference to *Greenwell v. Burwell*, 1 Ld. Raym. 454: There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was mal-practice by him. He brought his action. They pleaded the character of the college, giving them power to make by-laws for the government of all practitioners in medicine in London ; and to overlook them, and to examine their medicines and prescriptions, and to punish mal-practice by fine and imprisonment ; that they had, in the exercise of that power,

adjudged the plaintiff guilty of *mala praxis*, and fined him £20 and ordered him imprisoned twelve months, *nisi*, etc. It was held that the defendants had "jurisdiction over the person of the plaintiff inasmuch as he practiced medicine in London; and over the subject-matter, to wit: *the unskilful administration of physic*." That is the language of Holt, C.J., in that case. And, because the defendants had power to hear and punish, and to fine and imprison, it was held that they were judges of record, and because judges, not liable for the act of fining and imprisoning. See, also, *Ackerly v. Parkinson*, 3 Maule & Selw. 411. It is the general abstract thing which is the subject-matter. The power to inquire and adjudge whether the facts of each particular case make that case a part of an instance of that general thing; that power is jurisdiction of the subject-matter. Thus in *Hammond v. Howell*, *supra*, the defendant was saved from liability to civil action, inasmuch as he had as judge jurisdiction of the subject-matter, of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons; and he had jurisdiction of the subject matter, and his error was a judicial error, an act done *quatenus* judge, not an act done as Howell the private person, though it was an act contrary to law, grievous and offensive upon the citizen.

The inquiry then, at this stage of our consideration of the case, is this: Whether the defendant, sitting upon the bench of the Circuit Court, and being on that occasion *de jure et de facto* the Circuit Court, and having, as such, jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance, whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge, whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the inquiry whether the act then done, as the act of the court, was erroneous and illegal; that is but another form of saying, whether it could or could not be lawfully done, as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass

upon the facts presented, and to determine and adjudge that such an act, based upon them, would be lawful or unlawful.

That the defendant, as that court, had jurisdiction of the person of the plaintiff is manifest. He was before it on a return to a writ of *habeas corpus* sued out by him, and was produced in court by the marshal, to whom the writ was sent. He was in the custody of law, upon a judgment and sentence of that court; the validity of which he was questioning, and seeking from that court a vacating and annulling thereof. At least, until the order for vacating it was made, the plaintiff was lawfully within the power of the court.

That court also had jurisdiction of the subject-matter. It might, by law, indict and try persons charged with stealing and appropriating mail-bags; it might pass sentence upon them, when duly convicted, of fine or imprisonment, during the same term of the court, at which one sentence had been imposed; it might vacate it or modify it as law or justice would require. *Ex parte Lange*, 18 Wall. 163. If it had imposed a sentence greater than that prescribed by law, it could vacate it and inflict one in accord with the law; if no part of the invalid sentence imposed had been executed, it could vacate it and inflict one different in kind or degree. *Id.*; *Miller v. Finkle*, 1 Park. Cr. 374, and cases cited there. In England it has been held that at the same term the judgment might be altered, and by reason of subsequent conduct of the convicted person, the punishment be increased (*Reg. v. Fitzgerald*, 1 Salk. 401); and another sentence has been given after a portion of the former one had been suffered. *Rex v. Price*, 6 East, 323. The judgment, as expressed in the prevailing opinion in *Ex parte Lange*, *supra*, is not in accord with those two cases, and we cite them without expression of approval or otherwise. This was the subject-matter, the general matter, then before the court. The particular matter, or question, presented was the sentence of fine and imprisonment passed upon the plaintiff; was it erroneous and unlawful in that it went beyond the limit of the law, he having been some days in imprisonment under it, and having paid a sum of money equal in amount to the fine to the clerk of the court, who in turn had paid it to an officer of the United States Government;

was it lawful to vacate the sentence if in excess of the law ; if that sentence should be vacated, was it lawful, under the facts of the case, to impose another sentence which should be in accord with the statute ; did all these things present a case for the exercise of power, by virtue of the jurisdiction over the subject-matter ? The court, we have seen, had the jurisdiction last-named ; did it not also have jurisdiction to adjudicate upon that state of facts ? If it did have it, and did adjudicate erroneously, was it not a judicial error, to be relieved from by such writ as would bring it up for review, rather than a wrong done personally to be answered for in a civil action ? Is not the person who filled the office of judge, and by his presence on the bench, made that court, free from liability for that adjudication, though the act done by him was erroneous and unauthorized by law ?

It was held by this court in *Roderigas v. East River Savings Bank*, 63 N. Y. 460, that where general jurisdiction is given to a court of any subject, and that jurisdiction in any particular case depends upon facts which must be brought before that court for its determination upon the evidence, and where it is required to act upon such evidence, its decision upon the question of jurisdiction is conclusive until reversed, so far as to protect its officers and all other innocent persons who act upon it. How does it differ when general jurisdiction is thus given, and depends upon the legal conclusion from a conceded state of facts, and when the court is required to act thereon and draw a conclusion therefrom ? Is not the adjudication of that court conclusive until reversed, so as to protect ? Is not the act of adjudication, and the judgment given thereon, an act done with jurisdiction, hence, a judicial act ; an act done as a judge, or as a court ? In *Howell's case*, *supra*, there was no disputed question of fact. It was upon a conceded state of facts that he acted. He erred in his judgment of the effect in law of those facts, yet it was deemed a judicial error.

It is true that the United States Supreme Court, upon a certain state of facts before it, and in a proceeding by *certiorari*, to which this defendant was not a party, and in which he was not heard by that court, reached the conclusion that the second sentence of the Circuit Court was pronounced without authority, and dis-

charged the plaintiff from his imprisonment thereunder. *Ex parte Lange*, *supra*. In the prevailing opinion given in the case are repeated expressions to the effect that the power of the Circuit Court to punish, further than the first sentence, was gone ; that its power to punish for that offence was at an end when the first sentence was inflicted and the plaintiff had paid the \$200 and lain in prison five days ; that its power was exhausted ; that its further exercise was prohibited ; that the power to render any further judgment did not exist ; that its authority was ended.

It is claimed from these expressions that the force of the decision in that case is, that the defendant in pronouncing the second sentence upon the plaintiff did not act as a judge. It is plausible to say, that if an act sought to be defended as a judicial act has been pronounced without authority and void, it could not have been done judicially. But we have yet to learn that the eminent court which used that language in adjudging upon the case made upon that writ would hold that the defendant did not act as a judge in pronouncing the judgment, which was deemed without power to sustain it. The opinion also says : " A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and voidable judgments are very nice, and they may fall under the one class or the other, as they are regarded for different purposes." We do not think that learned court would disregard the reasoning of *Howell's case*, *supra*, and others like unto it. Yet in *Bushell's case*, *supra*, he was discharged on *habeas corpus*, on the ground that Howell, as judge, had no power or authority to fine or imprison him for the cause set up ; it was called " a wrongful commitment ; " 1 Mod. 184 ; as contrasted with " an erroneous judgment ; " 12 Mod. 381, 392 ; and yet, when *Howell* was called to answer in a civil action for the act, it was held that, though without authority, it was judicial. In *Bushell's case*, 1 Mod. 119, Hale, C. J., said : " The *habeas corpus* and the writ of error, though it doth make the judgment void, doth not make the awarding of the process void to that purpose," i. e., of an action against the judge ; " and the matter was done in a court of justice," he continued. So is the comment upon that case, *Yates v. Lansing*, 5 Johns. *290 ; " it had the jurisdiction of the

cause because it had power to punish a misdemeanor in a juror, though in the case before the court the recorder made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor. 2 Mod. 218.

So in *Ackerly v. Parkinson*, *supra*, the defendant was held protected, though the citation issued by him was considered as a nullity, on the ground that the court had a general jurisdiction over the subject-matter.

Let it be conceded, at this point, that the law is now declared, that the act of the defendant was without authority and was void; yet it was not so plain, as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, have agreed with him in his view of the law.

He was in fact sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public, and to the plaintiff, to pass, as such, upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars the validity of his judgment may depend. *Ackerly v. Parkinson*, *supra*. For such an act a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See *Garnett v. Farrand*, 6 B. & C. 611.

There is another view of this case. It is certain that the defendant, as the Circuit Court, had at first jurisdiction of the plaintiff, and jurisdiction of the cause and of the proceedings. That jurisdiction continued to and including

the pronouncing of the first sentence; nay, until and including the giving of the order vacating that sentence. If it be admitted that, at the instant of the utterance of that order, jurisdiction ceased, as is claimed by the plaintiff, on the strength of the opinion in *Ex parte Lange*, *supra*, as commented upon; *Ex parte Parks*, 93 U. S. 18, and that all subsequent to that was *coram non judice* and void; still it was so, not that the court never had jurisdiction, but that the last act was in excess of its jurisdiction. Thus in the opinion, *Ex parte Lange*, *supra*, p. 165, it was said that the facts very fairly raised the question whether the Circuit Court, in the sentence which it pronounced, and under which the prisoner was held, had not exceeded its powers. See, also page 174. We think that the whole effect of the opinion is, not that the court had no jurisdiction, no power over the prisoner and the case, but that it had no authority to impose further punishment; "all further exercise of it, in that direction, was forbidden," p. 178. What is an act in excess of judicial authority is shown by *Clarke v. May*, 2 Gray, 410. There, a justice of the peace, having jurisdiction of a case, summoned a person to appear before him as a witness therein. That person disobeyed. The case was tried and ended. Thereafter the justice issued process to punish for contempt the person summoned as a witness. He was arrested, fined, and not paying, was committed. It was held that the power to punish for contempt was incidental to the power to try the main case; that when the latter was ended, jurisdiction had ceased, and the power to punish for contempt no longer existed, and that the proceedings had to that end were in excess of jurisdiction, and the justice was liable. And the distinction between a case where the magistrate acts with no jurisdiction at all, and one where his act is "beyond or in excess of his jurisdiction, is shown by the case last cited, and that of *Piper v. Pearson*, in the same volume, page 120.

This act of the defendant was then one in excess of or beyond the jurisdiction of the court.

And though, when courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judice* and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court, or one of

general jurisdiction, for an act done by him in a judicial capacity. *Yates v. Lansing, supra*; *Bradley v. Fisher, supra*; *Randall v. Brigham*, 7 Wall. 523. In the last cited case it is said of judges of superior courts: They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, they are done maliciously or corruptly. Pages 536, 537; and in the other cases a distinction is observed and insisted upon, between excess of jurisdiction and a clear absence of all jurisdiction over the subject-matter. And to the same effect is this: "For English judges, when they act *wholly without jurisdiction* . . . have no privilege." Per Parke, B., *Calder v. Holket*, 3 Moore's P. O. C. 28, 75.

Now it may be conceded that the Circuit Court is not a court of general jurisdiction; that in a sense it is a court of limited and special jurisdiction, *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, inasmuch as it must look to the acts of Congress for the powers conferred. But it is not an inferior court. It is not subordinate to all other courts, in the same line of judicial function. It is of intermediate jurisdiction between the inferior and Supreme Courts. It is a court of record; one having attributes, and exercising functions independently of the person of the magistrate designated generally to hold it. Per Shaw, C. J. *Ex parte Gladhill*, 8 Metc. 168, 170. It proceeds according to the course of common law; it has power to render final judgments and decrees which bind the persons and things before it, conclusively, in criminal as well as civil cases, unless revised on error or appeal. *Grignon's Lessee v. Astor*, 2 How. (U.S.) 341. See *Ex parte Tobias Watkins*, 3 Peters, 193. "Many cases are to be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void and afford no protection to the court, the party, or the officer who executes its process. I apprehend that it should be qualified when the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause." Per Marcy, J., *Swacool v. Boughton*, 5 Wend. 172. How much more so, when the court is not inferior.

There are analogies in the law. Take the case of a removal of a cause from a State court

to the Circuit Court of the United States. When the party petitioning for a removal has presented his papers in due form and sufficiency to the State court, and has in all respects complied with the terms of the act of Congress, the State court cannot refuse. Though it does, all subsequent proceedings in it are *coram non judice*. See *Fisk v. U. P. R. R. Co.*, 6 Blatchf. 362; *Matthews v. Leyall*, 6 McLean, 13. Though the judge of the State court has a legal discretion to exercise as to the right of removal (*Ladd v. Tudor*, 3 Woodb. & M. 325), if the facts entitle to a removal, it may not be withheld; and when they are shown it is the duty of the State court to proceed no further; each step after that is *coram non judice*. *Gordon v. Longest*, 16 Peters, 101. Yet, in case a judge did, in the honest exercise of his judgment, refuse a removal and proceed with the case in the State court, would it be contended that he was liable in a civil action? He had jurisdiction of the cause originally. That jurisdiction had ceased. His further acts were beyond or in excess of his jurisdiction.

A plea of title put in a court of a justice of the peace in accordance with statute ousts it of jurisdiction. That court had jurisdiction of the cause originally, and the power to pass upon the sufficiency of the plea and accompanying papers. If it should err, and hold that jurisdiction had not been taken away, when it had, would the magistrate be liable in a civil action—always allowing for the difference in that that court is of limited and special jurisdiction. See *Striker v. Mott*, 6 Wend. 465.

For these reasons we are of the opinion that defendant is protected by his judicial character from the action brought by the plaintiff.

We have not gone into a written consideration of all the matters urged by the learned and zealous counsel for the plaintiff in the very elaborate and exhaustive brief and printed argument. We have read them with great interest and benefit. To follow them in an opinion, and to comment upon all the cases cited and positions taken, would be to write a treatise upon this subject. That would be no good reason why they should not be followed and discussed, if the requirements of the case demanded it. The case turns upon a question more easily stated than it is determined—was the act of the defendant done as a judge?

Our best reflection upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us to the conclusion, that as he had jurisdiction of the person and of the subject-matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of, or beyond jurisdiction, the act was judicial.

We are not unmindful of the considerations of the protection of the liberty of the person, and the staying of a tendency to arbitrary exercise of power, urged with so much eloquence by the learned and accomplished counsel for the appellant. Nor are we of the mind of the court in 2 Mod. 218, 220, that: "These are mighty words in sound, but nothing to the matter." They are to the matter, and not out of place in such a discussion as this. Nor have we been disposed to outweigh those considerations with that other class, which set forth the need of judicial independence and of its freedom from vexation on account of official action, and of the interest that the public have therein. See *Bradley v. Fisher*, *supra*; *Taafé v. Downs*, in note to *Calder v. Halket*, 3 Moore's P. C. C. 28, 41, 51, 52.

These are not antagonistic principles; they are simply countervailing. Like all other rules which act in the affairs of men, preponderance may not be fondly given to one to the disregard of the other; each should have its due weight yielded to it, for thus only is a safe equipoise reached.

We have arrived at our decision upon what we hold to be long and well-established principles, applied to the peculiar facts of this interesting case.

The judgment of the General Term should be affirmed. All concur.

—*Sprague v. W. U. Tel. Co.*, p. 200: A failure to send a telegraph message at all is not a "mistake or delay in delivery or non-delivery," within the meaning of the usual stipulation in blanks for telegraph messages. *Devlin v. O'Neil*, p. 305: A sale of goods to be disposed of by the vendee at retail if conditional, is fraudulent and void as to creditors of vendee. *Leviness v. Post*, p. 321: A blacksmith was held liable for the unskilfulness in shoeing a horse, of his servant, who was not employed to shoe horses, but who undertook the work.—[From *Daly's Reports*, C. P. N. Y.]

GENERAL NOTES.

PRESCRIPTION OF PROMISSORY NOTES.—In *Schindel v. Gates*, 46 Md. 604, it is held that the payment, by the principal in a joint and several promissory note, of the interest from year to year will prevent the statute of limitations from attaching to the note in favor of the surety. In the State of Maryland, the rule on this subject, as laid down in *Ellis v. Nichols*, 7 Gill, 86, is accepted as the law, which the court says is not to be questioned in the absence of legislation to the contrary. It is not, however, the general rule. There are, in regard to the power of one joint maker of a note to deprive the other of the defence of the statute, three distinct and irreconcilable theories: (1) That there is such a power and it exists indefinitely. (2) That there is no such power. (3) That there is such a power, but it ends when the term prescribed by the statute has elapsed. The first theory was at one time adopted in England (*Channell v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 G. & Dav. 46), in Massachusetts (*White v. Hale*, 3 Pick. 392), in Maine in New Hampshire, and in New York, but it has been of late years done away with by statute, or by the decisions of the courts. The second theory is the one in favor at the present time in most of the States and in the Federal courts. *Bell v. Morrison*, 1 Pet. 351; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Palmer v. Dodge*, 4 Ohio St. 21; *Coleman v. Fobes*, 22 Penn. St. 156; *Levy v. Cadit*, 17 S. & R. 126; *Seagrigh v. Craighead*, 1 Penn. 135; *Bush v. Stowell*, 71 Penn. St. 208; *Van Keuren v. Parmalee*, 2 N. Y. 523; *People v. Slite*, 39 Barb. 634; *Shoemaker v. Benedict*, 11 N. Y. 176; *Winchell v. Hicks*, 18 id. 558. The third doctrine is adopted in Maryland and some other States. *Ellicot Nichols*, *supra*; *Newman McComas*, 43 Md. 70; *Emmons v. Overton*, 18 B. Monroe, 643; *Wallon v. Robinson*, 6 Iredell, 341. The second theory appears to be the more equitable one and the one most in accordance with the prevailing view in regard to the statute of limitations, which is that it is a beneficial statute and one of repose on which a defendant has a right to rely with the same confidence as on any other statute, and that its force should be extended rather than restricted. Ang. on Lim. 283; *Shoemaker v. Benedict* *supra*; *Green v. Johnson*, 3 G. & J. 394; *Fisher v. Hamden*, Paine, 61.—*Alb. L. J.*

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THE CRIMINAL CODE OF VIRGINIA.

A new Criminal Code came into force in Virginia on the 1st July. A feature of this Code which has attracted considerable attention is the introduction of the whipping post, not for serious crimes, but for simple misdemeanors. This seems to be a step decidedly backward, and the plea which is urged on behalf of it—economy of State prison expenditure by substituting the lash for terms of imprisonment—does not mend the matter. When the lash was re-introduced in England for offenders of the worst description, those who committed robbery with violence, the law was enacted with no little misgiving. Upon the whole, however, it has worked well. But Virginia has not restricted the punishment to grave offences. It is to be imposed for trifling violations of the law, and even women are not exempt. The Courts, it is said, have large discretionary powers, so it may happen that magistrates of a humane disposition will substitute the alternative punishments, while others will be disposed to carry out the law in its utmost rigor.

A POINT OF PRACTICE.

A correspondent at Montreal has drawn our attention to a point of some interest to those practising in the Circuit Court. It appears that for many years past it has been the custom of the officials employed in the office of the Court to exact a fee of \$1.40 on the filing of every preliminary exception, in cases under \$40, besides the deposit of \$4.00. This exaction, for which no authority could be cited, was resisted recently by our correspondent, and on the matter being referred to Mr. Prothonotary Honey, it was admitted that the charge was illegal and unwarranted. It is not the first instance of the kind which has occurred. More than one charge unjustified by authority has been levied, and practitioners, rather than have an unpleasantness over a matter which perhaps does

not greatly touch their pocket, have fallen into the routine of paying the fees demanded. But it is evidently their interest that the Court House dues, which are already severe enough, should not be unnecessarily increased, and those who detect and resist illegal charges are doing a service for which they deserve the thanks of the profession.

PURCHASE OF GOODS OBTAINED BY MISTAKE AND FRAUD.

The decision of the House of Lords in *Cundy v. Lindsay* (38 L. T. R. N. S. 573), reported in the present issue, is of interest. A man named Blenkarn, by writing his name so as to be mistaken for Blenkiron, a responsible firm in London, obtained goods from the plaintiffs, linen manufacturers in Belfast. Blenkarn had no means of paying for the goods, and they would not have been sent to him but for the deception practised, by which the vendors were led to suppose that the purchaser was Blenkiron. The defendant bought the goods in good faith from him, and re-sold them. The action was against the defendant for conversion, the goods not having been purchased by him in market overt. The House of Lords has sustained the action, holding that the property in the goods never passed from the plaintiffs, and that the latter were entitled to recover their value from the defendant. One of the precedents referred to was *Hardman v. Booth*, 7 L. T. R. (N. S.) 638, where it was held that there was no real contract between the parties by whom the goods were sold and delivered, and the person who obtained possession of them by fraud, because the goods were not sold to him. For a case somewhat analogous under the Civil Code of Lower Canada, the reader may compare *Cassils & Crawford*, 21 L. C. Jurist, p. 1. In that case Crawford, in good faith, made advances on goods which had been stolen from Cassils. The goods being seized by the High Constable as stolen property, in the possession of Crawford, the latter sought to revendicate them as pledged for his advances; but the Court of Appeal at Montreal held that Crawford was not entitled to enforce his lien for advances as against the real owners, and the action in revendication was dismissed.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

FISHER et al. v. McKNIGHT et al.

Jurisdiction—Pleading.

A plea which invokes want of jurisdiction *ratione loci*, must be pleaded by declinatory exception; and the Court therefore refused on the merits to take notice of a plea that the note sued on had been endorsed by an employee of plaintiff merely to give the Court an improper jurisdiction.

JOHNSON, J. The plaintiff sues McKnight and Hoggard on a note made by Alger to McKnight's order, and endorsed by McKnight to Hoggard, and by Hoggard to the plaintiff. This is the recital of the declaration. The plea is that Hoggard never received the note by endorsement from McKnight, but is an employee in the plaintiff's office in Montreal, and only put his name on it here to give the Court an improper jurisdiction over McKnight, who lives in Quebec. This is strictly a question of jurisdiction, and should have been pleaded as such, jurisdiction *ratione loci* merely, and which I cannot take notice of now that the party has accepted jurisdiction by pleading to the merits. The plaintiff moves to strike out the endorsers' names appearing after Hoggard's, the late Judge Dorion having declined to give judgment for the plaintiff while these endorsements remained. I hold that I must grant the plaintiff's motion and give judgment for the plaintiff against both endorsers, who are sued. Art. 2289 recognizes the plaintiff's right to do this. It refers to Roscoe and to Story, on bills, and to Kent's commentaries. I regard this article as declaratory of the English commercial law in this respect, and the motion has the effect of changing the demand or the form in which it is made *pro tanto*. In England this is done every day at the trial; and in this particular case there could be no need of a motion to amend the declaration so as to accord with the proof, because it claimed through McKnight's and Hoggard's endorsements only, and not through the subsequent ones.

On the point of jurisdiction I may add, that in June, 1874, in a case, or rather series of cases, of *Ford et al v. Auger et al.*, all of which were put before me at one hearing, I went very

fully into the point of the effect of collusive service to give jurisdiction. There, however, there was a declinatory exception, and though it was dismissed for want of evidence to support it, the rule I followed was that where the want of jurisdiction is invoked *ratione materiae*, the Court can take notice of it on the merits; but where it rests on the *ratio loci*, or *ratio personarum*, it must be expressly pleaded by declinatory exception.

Macmaster & Co. for plaintiff.

Lunn & Co. for defendant.

DORION v. BENOIT.

Place of Payment—Demand before suit.

Where a person made a note *en brevet* payable at his domicile, *held*, that the creditor was bound to make demand of payment at the place specified, and an application by the debtor for an extension of time was not a waiver of his right to pay at such place.

JOHNSON, J. The action was to recover the amount of a note *en brevet* with interest from 1st October and costs of suit. The note was payable in the course of September at the defendant's domicile at St. Bruno, the plaintiff residing at St. Eustache. The declaration alleged no demand of payment at the stipulated place; but it alleged that when the note came due, the money was not there. The defendant pleaded that he had had the money ready at the time and place stipulated, and no demand or presentation had been made; but he confessed judgment for the principal sum without interest or costs—which was not accepted by the plaintiff, and the case is now up for judgment, the money having been taken under an interlocutory order reserving the questions of interest and costs only. It was said that this *billat* was not stamped, but the plaintiff has got the money and is no longer interested in that—his only rights being those reserved as the condition on which he got it. From the evidence the defendant wrote on the 8th October in answer to a lawyer's letter and asked the plaintiff for delay. This could not relieve the creditor from the antecedent obligation of asking payment at the place stipulated, and it was no admission that the money was not there at the time agreed. There is evidence on the contrary, that the money was there at the right time. It must be observed that this is not a commercial matter. The defendant is a farmer

who gives his obligation or *billet*, as it is commonly called, *sous brevet*. The arrival of the term of payment did not give rise to interest. His obligation was to pay without interest at his house; and I cannot see where he has failed in that obligation. Then it is said the suit is a demand: so it is:—but of what? not to pay the note where it was made payable by the terms of the contract; the bailiff who served the writ never presented the note. The writ was a command to come and answer here in court, in Montreal; the debtor came, and he brought his money with him, and the creditor contesting after that, on the authority of Poulin & Prevost, has to pay costs. Judgment according to first plea, giving *acte* of confession of judgment, and condemning plaintiff to pay defendant's costs.

Champagne for plaintiff.

Longpré for defendant.

Montreal, July 9, 1878.

PAPINEAU, J.

TURCOTTE v. REGNIER.

Capias—Desistement—Jurisdiction.

Held, where an action for \$67 was originated in the Superior Court by *Capias ad Respondendum* duly executed, but of which a *desistement* was subsequently filed by plaintiff on the return day, that such action could not be then continued before the said Court for want of jurisdiction, and must be dismissed. *Sauf recours* to plaintiff to proceed before the proper Court.

On the 18th May, 1878, plaintiff sued for \$67, but took out the action in the Superior Court by *Capias*, alleging that defendant was leaving the Province of Quebec for Manitoba. On the 6th June, the day of Return, the defendant appeared by attorney, who was then served with a *desistement* of the *Capias* only, the plaintiff keeping his recourse by his action for the debt as instituted.

The defendant, by *Exception Déclinatoire*, pleaded that by such *desistement* of the *Capias*, the same being but the accessory and giving jurisdiction, the Superior Court had no longer jurisdiction.

The judgment of the Court was as follows:

The Court, etc., considering that the *Capias ad Respondendum* accompanying the action could alone give the right to plaintiff to institute his action before this Superior Court for the amount claimed of \$67 only, and that it is not established by proof that plaintiff had returned his action in Court before making his

desistement of the *Capias*, the Exception *Déclinatoire* is maintained, and the defendant is therefore put *hors de Cour* with costs against plaintiff, the Court reserving to plaintiff the right of taking out his action before the proper Court.

Thibault & Messier for plaintiff.

A. W. Grenier for defendant.

FRAUDULENT PURCHASES OF GOODS.

HOUSE OF LORDS, MARCH 4, 1877.

CUNDY, v. LINDSAY, Appl't, 38 L. T. REP. (N. S.) 573.

A purchaser of a chattel, who has not purchased in market overt, takes the chattel subject to any infirmity of title in the vendor, even if he purchase *bona fide* without notice.

A person of the name of A. Blenkarn wrote to the respondents and ordered goods of them, intentionally signing his name in such a manner as to be taken for Blenkiron. There was a respectable firm of that name, and the respondents, believing that they were dealing with that firm, forwarded the goods to Blenkarn. Blenkarn had no means of paying for the goods. The appellants afterward purchased the goods *bona fide* from Blenkarn.

Held (affirming the judgment of the court below), that the property in the goods had never passed from the respondents, and that they were entitled to recover the value of them from the appellants.

Hardman v. Booth, 1 H. & C. 803; 7 L. T. Rep. (N. S.) 638, followed.

This was an appeal from a judgment of the Court of Appeal reported in 2 Q. B. Div. 96, and 36 L. T. Rep. (N. S.) 345, reversing a decision of the Queen's Bench Division, reported in 1 Q. B. Div. 348, and 34 L. T. Rep. (N. S.) 314, in favor of the appellants, who were the defendants below.

The plaintiffs were linen manufacturers at Belfast, and the defendants carried on business in London. The action was brought for the conversion of 250 dozen cambric handkerchiefs. The case was tried before Blackburn, J., and a special jury, in Nov., 1875.

At the trial it appeared that a person named Blenkarn ordered goods in writing from the plaintiff, giving as his address "Blenkarn & Co., 37 Wood street, and 5 Little Love Lane, Cheap-side." There was a very respectable firm of Blenkiron & Sons, carrying on business in Wood street, whose name was known to the plaintiffs, and they supplied the goods, be-

lieving that they were dealing with that firm. Blenkarn had no means of paying for the goods, and on the discovery of the fraud he was prosecuted for obtaining goods by false pretences, and was convicted. Before his conviction he had sold some of the goods to the defendants in the ordinary way of business, and the defendants had resold them before the fraud was discovered. It was admitted that they were *bona fide* purchasers for value.

The Queen's Bench Division directed the verdict to be entered for the defendants on the ground that the property in the goods had passed to Blenkarn, and from him to the defendants, but this decision was reversed as above mentioned.

The *Solicitor-General*, (Sir H. S. Giffard, Q.C.), *Benjamin*, Q.C., and *B. F. Williams*, for appellants.

Wills, Q.C., and *Fullarton*, for respondents.

The LORD CHANCELLOR (Cairns). My Lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practiced upon both of them must fall. In discharging that duty your Lordships can do no more than apply rigorously the settled and well-known rules of law. With regard to the title to personal property, those rules may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner, then the purchaser will obtain a good title, even though afterward it should appear that there were circumstances connected with the contract

which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced. The question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property from Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing the property, even though, as I have said, it might afterwards be open to a process of reduction on the ground of fraud, still in the meantime Blenkarn might have conveyed a good title for valuable consideration to the present appellants. Now there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods passed, it could only pass by way of contract, there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever, as to conversations or as to acts done; the whole history of the transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally: everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case. Now, discharging that duty, and answering that inquiry, what the jurors have found in substance is this: they have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which in turn he was addressed by the respondents, that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Sons, doing business in the same street.

Those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case. If that is so, what is the consequence? It is that Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Sons to the applications for goods, and as if, when in return the goods were forwarded, and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods and of the letters which were addressed to and intended for, not himself, but the firm of Blenkiron & Sons. Now, stating the matter shortly in that way, I ask the question, is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn? Of him they knew nothing, and of him they never thought, with him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement, or to any contract whatever. As between him and them there was merely the one side to a contract where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Sons of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure. The result, therefore, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterward be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. That being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which it was attempted to give to the appellants was a title which could not be given to them. I, therefore, move your Lordships, that this appeal be dismissed with costs, and the judgment of the Court of Appeal be affirmed.

LORD HATFIELD.—My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here is this, whether or not any con-

tract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described by the verdict of the jury: the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn. Now the case is simply this, as put by the learned judge in the court below; it was most carefully stated as we might expect it would be by that learned judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard? And further than that, did he actually by that fraud induce Mr. Thomson to send the goods to 37 Wood Street?" Both these questions were answered in the affirmative by the jury. What then was the result? It was that there were letters written by a man endeavoring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Sons, Wood street. This was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And, further, his letters and invoices were headed "Wood street," which was not an accurate way of heading them, for he occupied only a room on a third floor, looking into Little Love lane on one side, and into Wood street on the other. He headed them in that way in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood street, if they had chosen to adopt it, and to no other person whatever; not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever. It appears to me that this brings the case completely within

the authority of *Hardman v. Booth*, 1 H. & C. 803; 7 L. T. Rep. (N. S.) 638, where it was held that there was no real contract between the parties by whom the goods were delivered and the concocter of the fraud who obtained possession of them, because they were not sold to him. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman v. Booth* over again. My attention has been called to another case which seems to have been decided on exactly the same principle as *Hardman v. Booth*, and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higgins v. Burton*, 26 L. J. 342, Ex. There one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent, but he had been dismissed from the agency, therefore there was no contract with the firm; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to the loss. The point of the case is put so very shortly by Pollock, C.B., that I cannot do better than adopt his reasoning: "There was no sale at all, but a mere obtaining of goods by false pretences; the property therefore did not pass out of the plaintiffs." The other judges, Martin, Bramwell, and Watson, BB., concurred in that judgment. Here, I say, exactly as in the cases of *Hardman v. Booth* and *Higgins v. Burton*, there was no sale at all; there was a false representation made by Blenkarn, by which he got goods sent to him

upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Sons. But no contract was made with Blenkarn, nor was any contract made with Blenkiron & Sons, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property. We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued for the appellants in this case, namely: Suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm. Or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm, I have a large balance at my bankers;" then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly have passed the property. But this case is an entirely different one. The whole case, as represented here, is this: from beginning to end the respondents believed they were dealing with Blenkiron & Sons, they made out their invoices to Blenkiron & Sons, they supposed they sold to Blenkiron & Sons; they never sold in any way to Alfred Blenkarn; and, therefore, Alfred Blenkarn cannot by so obtaining the goods have by any possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.

LORD PENZANCE.—My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by doing so they passed the property

in them to Alfred Blenkarn is, I conceive, the real question to be determined. The respondents had never seen, or even heard of, Alfred Blenkarn, when they received a letter, followed by several others, signed in a manner which was not absolutely clear, but which the writer intended them to take, and they did take, to be the signature of a well-known house of Blenkiron & Sons, which in fact carried on business at No. 123 Wood street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Sons was known to the respondents, and it was also known that they lived in Wood street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Sons in Wood street, but in place of No. 123 they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Sons, No. 37 Wood street, London. It was not doubted or disputed that throughout this correspondence, and up to and after the time that the respondents had dispatched their goods to London, they intended to deal, and believed they were dealing, with Blenkiron & Sons, and with nobody else; nor is it capable of dispute that when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Sons, to whom they addressed these goods. The goods, however, were not delivered to Blenkiron & Sons, to whom they were addressed, but found their way into the hands of Alfred Blenkarn, owing to the number in Wood street being given as No. 37 in place of No. 123, a mistake which had purposely been brought about by the writer of the letters, as I have before mentioned, who was no other than Alfred Blenkarn, who had an office at 37 Wood street. In this state of things it is not denied that the contract for dealing which the respondents thought they were entering into with Blenkiron & Sons, and in fulfillment of which they parted with their goods and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Sons knew nothing of the transaction. But the appellants say it was

a contract with and a good delivery to Alfred Blenkarn, so 'as to pass the property in the goods to him, although the goods were not addressed to him, and the respondents did not know of his existence. I am not aware that there is any decided case in which a sale and delivery intended to be made to one man has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that, as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there, whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co." I am unable to distinguish this case in principle from that of *Hardman v. Booth*, *ubi sup.*, to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them; the court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Sons, with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me quite alike. Another case of a similar kind is *Higgins v. Burton*, *ubi sup.*, to which similar reasoning was applied. Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of some cases which I can

imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn; all their letters, though received and answered by him, were addressed to Blenkiron & Sons, and were intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Sons, though at a wrong address. This appeal ought, therefore, in my opinion, to be dismissed.

Judgment affirmed.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

I. Professional Blindness as to the Rules of statutory Interpretation.

II. Mistake of Fact as an Excuse for Crime.

III. Remedies for judicial Blunderings.

I am to write of blunderings. The entire subject would be too large for an article; but something may here be given of general doctrine, and something of illustration. Let us consider: I. Professional blindness as to the rules of statutory interpretation. II. Mistake of fact as an excuse for crime. III. Remedies for judicial blunderings.

I. Professional Blindness as to the Rules of statutory Interpretation.—There are a few legal subjects on which the entire profession seem to be forsworn to ignorance. Prominent among them is the subject of the interpretation of statutes. There is not a day in the professional life of any lawyer who does a respectable amount of business in which he has not occasion to consider the interpretation of some statute. Yet, if you look into his library, you find no book on the subject; or if into the chamber of his brain, where he keeps his legal knowledge, you discover nothing on the topic there. The majority of lawyers appear not even to understand that it is a subject, or is governed by any rules. They know too little about it to comprehend their deficiencies or their needs. Good common sense, as they term the unaided speculations of their own minds, is, according to some, adequate to any emergency connected with this question; according to others, there

are no rules, and any study of the subject, or the reading of any book upon it, would be a mere waste of time. A reviewer, in a legal periodical, not long ago mounted to the grand climax of the idea when, writing to instruct his readers regarding a particular book relating to the topic, he declared, after employing a few phrases to show his ignorance of the subject, and even of the book before him, that, in the nature of things, such a book could be of no permanent value, *because the statutes are constantly changing!*

All things on earth, all in the part of heaven of which we have any knowledge, and all in so much of hell as human eyes can discern, are indeed changing; but, be the statutes tinkered however much and often, the changes in them are slight compared with those in most other things. And, small or great, the rules to interpret them are to a very inconsiderable extent statutory; so that the doctrines of statutory interpretation change less than those pertaining even to real property. They are the most permanent and fixed of all the doctrines of our law—the most fit for a common-law treatise. Not only is a book on the interpretation of statutes emphatically on the common law, but it is on the most stable and least shifting part of the entire system.

No lawyer who looks into the question, or even pauses for a moment to think upon it, can fail to see that this is so. Yet how different is the common thought of the profession! This will be palpable from the following facts:

The late Theodore Sedgwick wrote two approved books on the law—the one on the "Measure of Damages," and the other on the "Interpretation of Statutes and our written Constitutions." While the former of these books was in its second edition, the latter appeared, in 1857. Not until 1874, seventeen years afterward, was there a call for a second edition of the latter book, and the former was in its sixth edition. Yet the average practitioner has, at least, a half dozen questions to answer on the interpretation of statutes to one on the measure of damages; so that the more successful book ought to be the one which is so very much the less successful. There was no American book on either subject to compete with Sedgwick's, and no English one selling to an extent varying the effect of this statement.

It shows, I repeat, that the lawyers, in general, understand too little of this common-law subject of the interpretation of statutes to be able to discern their own needs.

Further views of this topic will appear in connection with our next, namely :

II. *Mistake of Fact as an Excuse for Crime.*—

The division of our jurisprudence into its two departments of civil and criminal reveals some marked contrasts. For example, in the civil the object is to establish what is just and expedient between private persons: hence, in various situations, one who is personally without fault is compellable to pay damages to another. On the other hand, the criminal law is for the punishment of persons who are in fault, as a means of restraining them and deterring others from evil-doing. And the universal doctrine of this department is that one whose mind is free from wrong is not to be punished. To punish such a person would be unjust, and no state can, with impunity, commit injustice. But, further than this, the proposition is, I believe, accepted among all who have reasoned on the subject that even just punishment should not be inflicted except where it may have a restraining power. Paley goes even further, without, it seems, contravening general doctrine, observing: "Punishment is an evil to which the magistrate resorts only from its being necessary to the prevention of a greater. This necessity does not exist when the end may be attained—that is, when the public may be defended from the effects of the crime—by any other expedient."^{*}

This entire doctrine pertains to our criminal law—not to our civil—the same as it does to our public ethics and economy. In the words of Lord Kenyon, as to the former of the two propositions above, "it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime."[†] This doctrine is as familiar as it is fundamental, and authorities to it might be piled up to fill an entire number of this Review. The precise act, to be punished, need not in all cases have been specifically meant; but in all cases it must have been the product of some sort of evil in the mind. For example, a mere indifference or carelessness

where carefulness is a duty, or an intent to do one particular wrong when another follows not meant, or a voluntary incapacitating or maddening of one's self by strong drink, will, in many cases, stand in the stead of the specific criminal intent.* But without some sort of mental culpability there is no crime. If there was, another of the foregoing principles would still forbid its being punished. All that any man can do is to intend well, and to employ his faculties to the best of his ability and put forth his full exertions to prevent evil. If, in spite of all, evil unmeant comes from his act, it can restrain neither him nor any other person to punish him. Hence the state, whose will the courts expound, ought not to punish him. To illustrate:

In cities and villages where the people do not keep cows they need pure milk as much as they do in the country. Without it many an infant, and perhaps occasionally an adult, who now live with it, would die. Moreover, it is an important article of food for all classes; and he who supplies it is a benefactor. So that, in some of our states, the selling of adulterated milk is made an indictable offence. And a dealer ought to be held to a high degree of caution as to the milk he sells. But in a single instance there may be an adulteration which it is impossible he should know of or avoid, however extreme his caution may be. Suppose such an instance occurs, and the dealer is punished; if he does not leave the business, to the detriment of the public interests, the punishment can have no effect to prevent the repetition of the same thing, either by him or by any other dealer. Hence punishment should not be inflicted even if it were deserved. And when we consider, also, that it is not deserved, but is a gratuitous and wicked wrong inflicted on an innocent party, no fit word to characterize it is found in the language.

One form of the doctrine of the criminal intent is that, if a man honestly intends to obey the law, and uses due care and caution to ascertain the facts, yet is misled concerning them, then, if he does what, were the facts as he thus believes them to be, would be no violation either of the law which he intends to obey or of any other legal or social duty, he is

* Paley's Moral Phil., b. 6, ch. 9, par. 1.
† Fowler v. Padget, 7 T. R. 509, 514.

* See, for a fuller explanation, 1 Bishop's Cr. Law, 6th ed., §§ 285—355.

not punishable, though under the actual facts he would be had he known them. The purpose which prompts his actions being in accord with his whole duty, no accident beyond his control, such as occurs when he is misled concerning facts, can make a mere external act, to which nothing in the mind corresponds, a proper subject of punishment. Within this general doctrine there may be differences on minor points; but I have purposely stated it, not with exact reference to them, but in a form to excuse no one who would not be excusable by all opinions, according to the rules of the common law.

A familiar illustration of the doctrine may be seen in an old case, in which it was held that one is not punishable for killing in the night a member of his own household whom he mistakes for a burglar, "for he did it ignorantly, without intention to hurt the said Frances."*

Again, a statute in Massachusetts provided that, "if any person shall be found in a state of intoxication in any highway, street, or other public place, any sheriff, deputy-sheriff, constable, watchman, or police-officer shall, without any warrant, take such person into custody and detain him in some proper place until, in the opinion of such officer, he shall be so far recovered from his intoxication as to render it proper to carry him before a court of justice." Thereupon an officer, having "reasonable or probable cause to believe" that a person was thus intoxicated, arrested him, while in fact he was not; and, being indicted for this as for an assault and battery, the court held him to be justified. After stating from Blackstone the common doctrine as to mistake of fact, Hoar, J., delivering the opinion of the court, proceeded: "This principle is recognized by all the best authorities upon criminal law. Thus, in Russell on Crimes, volume 1 (7th Am. ed.), it is said that, 'without the consent of the will human actions cannot be considered as culpable; nor, where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences.' And in Hale's Pleas of the Crown, volume 1, page 15, the general doctrine is stated that, 'where there is no will to commit an offence, there can be no

transgression.' See, also, 1 Gab. Cr. Law, 4. And, in all these writers, ignorance of fact, unaccompanied by any criminal negligence, is enumerated as one of the causes of exemption from criminal responsibility."*

Illustrations of this sort might be repeated indefinitely; but in this connection I shall simply mention one other, which I select because it bridges over the argument to my next proposition. It is that if a person is insane, not in all his faculties, but simply to the extent of having insane delusions which he accepts as facts, then, if a thing falsely believed to be true is such as would justify him in taking another's life, were it a reality, and, impelled thereby, he takes the life, he is not punishable. So it has been clearly adjudged in Massachusetts† and in England,‡ and the doctrine is everywhere accepted as sound. "If" asked the House of Lords, questioning the common-law judges, "a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" "To which question," replied Lord Chief Justice Tindal, "the answer must, of course, depend on the nature of the delusion; but, making the assumption * * * that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."§

"It would be singular, indeed," said Hoar, J., in the Massachusetts case, wherein an officer took up a person in the streets for being drunk, when he was not, "if a man deficient in reason would be protected from criminal responsibility, and another, who was obliged to decide

* The Commonwealth v. Presby, 14 Gray, 65, 67.

† The Commonwealth v. Rogers, 7 Mete. 500.

‡ Opinion on Insane Criminals, 8 Scott, N. R. 505; 1 C. & K. 130, note; 10 Cl. & Fin. (in McNaghten's case) 200.

§ *Ibid.*, at p. 135 of the report in C. & K.

* Levett's Case, stated Cro. Car. 538.

upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty.*

This brings us to an extraordinary series of professional and judicial delusions, next to be considered.

[To be continued.]

DIGEST OF ENGLISH CASES.

The following is a digest of the principal cases reported in the English Law Reports for February, March and April, 1878.

Acceptor.—See *Bills and Notes*, 1, 3, 5.

Adjacent Support.—See *Easement*.

Advocate.—See *Attorney and Client*, 1.

Agent.—See *Principal and Agent*.

Agreement.—See *Contract*.

Ambiguity.—See *Will*, 1.

Ancient Lights.—In an action for obstruction of ancient lights, it appeared that plaintiff was entitled to access of light by prescription, and that defendant had diminished the light by erecting a high building opposite, but that there was still light enough for the business carried on in plaintiff's premises. *Cockburn, C. J.*, instructed the jury that they should bring in substantial damages, if they found that the light had been sensibly diminished, so as to affect the value of the premises, either for the purposes for which they had been previously used, or for any purpose for which they were likely to be used in the future. Defendants contended that the damages should be nominal, unless it appeared that the premises were injured for the purposes for which they had always been and were still used. *Held*, that the instruction of the judge was correct. *Martin v. Goble* (1 Camp. 320) questioned.—*Moore v. Hall*, 3 Q. B. D. 178.

Animus Manendi.—See *Domicile*.

Annuity.—A testator gave an annuity to his son, with cesser and gift over "if he shall do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged or incumbered." The annuitant committed an act of bankruptcy by failing to answer to a debtor's summons. *Held*, that the annuity thereupon ceased.—*Ex parte Eyston. In re Throckmorton*, 7 Ch. D. 145.

Anticipation.—A married woman, entitled under a will to £400 a year for her separate use,

without power of anticipation, joined with her husband in mortgaging her interest under the will, by perpetrating a gross fraud upon the mortgagee as to the restraint upon anticipation. The mortgagee got judgment against them, and an order to charge the wife's income as it came due. *Held*, that the restraint on anticipation could in no case be evaded or set aside, even in case of such gross fraud.—*Stanley v. Stanley*, 7 Ch. D. 589.

Attorney and Client.—1. Defendant, a Scotch advocate, was legal adviser and agent for two ladies, as trustees for their father's estate. Under his direction, two houses belonging to the estate were sold, nominally to defendant's brother, but in reality the defendant himself was the purchaser, though without the knowledge of his clients.—*Held*, that the purchase could not be enforced.—*McPherson v. Watt*, 3 App. Cas. 254.

2. During the progress of a suit, the plaintiffs mortgaged their interest in the estate concerned in the suit to the defendants therein. The plaintiffs' solicitor sanctioned the mortgage, and subsequently got his costs in the said suit charged on the plaintiffs' interest in the estate.—*Held*, that under the circumstances the mortgage must be postponed to the costs, as the defendants must be held to have known of his lien when they took the mortgage.—*Faithful v. Even*, 7 Ch. D. 495.

Bank.—See *Bills and Notes*, 4.

Bankruptcy.—See *Annuity; Composition; Fixtures; Lease*.

Bill of Lading.—A bill of lading for a cargo of wheat, shipped at New York for Glasgow, contained an exemption from liability for loss from perils of the sea, or loss due to the negligence of the officers or crew of the ship. The cargo was injured by sea-water admitted into the hold, as the jury found, five days after sailing, through a port-hole negligently left unfastened by the crew; but the jury did not find whether the port-hole was left unfastened before the sailing or subsequently. *Held*, that the case must be remanded for a finding on this point, the question of liability depending upon whether the implied warranty of seaworthiness at the commencement of the voyage had been complied with.—*Steel et al. v. The State Line Steamship Co.*, 3 App. Cas. 72.

See *Demurrage*.

Bills and Notes.—1. The plaintiff, a merchant

* The Commonwealth v. Presby, 14 Gray, 65, 68, 69.

in London, procured a loan of £15,000 of the defendant bank, on the security of a cargo of goods in transit to Monte Video, and of six bills of exchange drawn by him on S., the consignee of the goods in Monte Video, and accepted by the latter. Two of these bills having been paid and two dishonored, the defendant bank, through its branch in Monte Video, proposed to sell the goods at once, when the plaintiff wrote the defendant not to sell, and sent his check for £2,500, as additional security, adding, that when the bills were paid, "you will of course refund us the £2,500." The defendant drew the check; and, the other two bills having been dishonored, the defendant took proceedings against S., as a result of which the goods were, with plaintiff's consent, sold, and the bills without plaintiff's knowledge, delivered up to S. cancelled. The proceeds of the goods were insufficient, even with the £2,500, to satisfy the claim. *Held*, that the plaintiff could not recover the £2,500 from the defendant.—*Yglesias v. The Mercantile Bank of the River Plate*, 3 C. P. D. 80.

2. A bill of exchange drawn by a firm in one country upon the same firm in another country, and accepted in the latter place, is perhaps, strictly, a promissory note, but the holder may treat it either as a promissory note or as a bill of exchange; and where it appears to have been the intention that it should be negotiable in the market as a bill of exchange, it should be treated as such.—*Willans et al. v. Ayers et al.*, 3 App. Cas. 133.

3. By 19 & 20 Vict. c. 97, sec. 6, "no acceptance of a bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor, or some person duly authorized by him." *Held*, that the word "accepted," written across the face of the bill, and unsigned, did not satisfy the statute.—*Hindhaugh v. Blakey*, 3 C. P. D. 136.

4. The plaintiffs, holders of a promissory note payable at the M. branch of the defendant bank, and drawn by parties having an account at the Y. branch of the said bank, deposited it with the S. branch of said bank, to be sent to the M. branch for collection. The M. branch, in the course of business, stamped the note as "paid," cancelled the signatures, and sent the S. branch a draft therefor in favor of the plain-

tiffs. The same day, the Y. branch, in its books, credited the drawers of the note with the amount thereof, but no notice of the credit was sent the drawers or holders. Two days later, the drawers becoming irresponsible, the M. branch wrote the S. branch to cancel the draft, and returned the note dishonored with the indorsement, "cancelled in error." There was no evidence as to the state of the drawers' account at the Y. branch. *Held*, that the effect of marking the note "paid," and cancelling the signatures, was rendered null by writing on it "cancelled in error," before returning it to the holders; and that the entries in the accounts between the branches of the bank as to payment of the note not having been communicated to the holders of the note, were not effectual to charge the bank with receipt of the money.—*Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

5. An acceptor of a foreign bill of exchange subsequently dishonored, is liable by way of a charge for re-exchange for all the necessary expense incurred by the drawer in consequence of its having been dishonored by the acceptor.—*In re General South American Co.*, 7 Ch. D. 637.

Bonds.—See *Mortgage*.

Broker.—See *Factor*.

Carrier.—See *Common Carrier*.

Caveat Emptor.—See *Sale*.

Charter Party.—See *Demurrage*.

Children.—See *Devise*, 2; *Will*, 4.

Common, Rights of.—See *Pannage*.

Common Carrier.—Plaintiff signed a contract with the defendant company, by which the latter was to carry some cheeses for plaintiff at "owner's risk;" that is, the company was to be responsible only for injury resulting from the "wilful misconduct" of its servants." In consideration of this limitation of liability, a lower rate was charged. The contract further stated that the company would carry goods at a higher rate, assuming all the usual liabilities of common carriers. The plaintiff had knowledge of all the foregoing facts. The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, permits railway companies to make such special contracts for carriage of goods as shall be adjudged "just and reasonable" by the court. The cheeses were so negligently packed by the company's servants that they were damaged; but the packers did not know that damage would result. *Held*, that the plaintiff could not recover.—*Lewis v. The Great Western Railway Co.*, 3 Q. B. D. 195.

[To be continued.]

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FICTITIOUS APPEALS.

The number of genuine suits and appeals in the present age is so overwhelming that it is quite natural for courts and judges to condemn severely the attempt to inflict dummy litigation upon them. We do not know whether New Zealand has yet attained a fair share of legal business, or whether the judges of that colony have still leisure for imaginary controversies, but the *New Zealand Jurist* states that there were four dummy appeals heard at a recent sitting of the New Zealand Court of Appeal. The solicitors, it appears, for mere display, set the cases down after they had been settled; and the judges, though aware that there was no *bona fide* controversy, heard the cases and decided them. Our contemporary is incensed at this proceeding, and cites precedents to show that in England attorneys bringing up dummy appeals would be considered guilty of a contempt of court. Litigation for the mere fun of the thing cannot be too severely repressed, yet cases frequently arise in which it is convenient for parties to obtain the opinion of the Court on a doubtful point of law without the bitterness and ill-will which usually attend an ordinary suit. We presume the *New Zealand Jurist* does not mean to include such cases in its censure. If there is a useful object, no contempt of court is intended, and it would be harsh to infer it.

STAYS v. STRAPS.

A novel illustration of contributory negligence has figured before the Supreme Court of Pennsylvania, the title of the cause being *West Philadelphia Passenger R. R. Co. v. Whipple*. A woman, while being conveyed in one of the company's cars, and unable to find a seat, was thrown down and injured by the sudden stopping of the car. She sued for damages, but the company contended that she had been guilty of contributory negligence in not taking hold of the hand straps with which the car was provided. The woman answered

that she could not conveniently have done so, as it would have disarranged her dress, and she had taken hold of the hand of a friend. At the trial, the question of negligence on her part was left to the jury, with the instruction that if they found she could not conveniently reach the strap, and so took hold of the hand of a fellow passenger, it was for them to say whether this was a sufficient precaution. The Supreme Court very properly held this instruction to have been correct, and added that "possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up, as to deprive her of her natural power to help herself; but, if so, the question is one of fact, and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case."

A PROTRACTED SUIT.

We do not think that law suits in the present day are spun out to such interminable length as was often the case in times gone by. Few litigations attain the longevity satirized by Dickens in *Jarndyce v. Jarndyce*. In Canada, assuredly, law is not only cheap but expeditious, and as a rule two years measures the life of the hardest fought case on this side of the Atlantic. In England, too, great efforts have been made to oil the wheels of justice, and cases progress much more rapidly than of old. In the United States the machinery is probably upon the whole not less expeditious, but our contemporaries there have discovered one case, *Yale v. Dederer*, reported in 68 N. Y., which seems to be a remarkable exception. The action was brought to charge the estate of a married woman with a promissory note signed by her. The note was payable 1st May, 1854, and the suit was instituted soon after. In August, 1855, it was heard by the Special Term of the Supreme Court (21 Barb. 286). It made a first appearance before the Court of Appeals in December, 1858 (18 N. Y.), when the Court held that a promissory note did not charge the separate estate of a married woman, unless she intended that it should have that effect. The case went back for re-trial, and came up before the Court of Appeals a second time in 1860 (22 N. Y.) The Court on this occasion held

that the intention must be expressed in the instrument. The parties seem to have been discouraged by this decision, and the case slumbered for near a score of years. But once more it made its appearance before the Court of Appeals, and on the 30th January, 1877, was finally determined. The judgment was for the defendant, the Court intimating that *while regretting the rule they had established before, they would not change it*. The note was for \$998; the report is silent as to the amount of the costs, but it would naturally be greatly in excess of the claim.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

[Continued from p. 359.]

No one ever doubted that, if a statute says, "Whoever does so and so shall be punished," it does not subject to punishment an insane person, or a person under the age of seven years. But why not? The Legislature has made no exception. Is not the legislative will to be obeyed? What right has a court to set up its notions against the express command of a statute? If the statute is wrong, let the prosecuting officer enter a *nolle prosequi*; or, if he does not choose to do this, let the governor pardon the offender after conviction. Why look to the judges for mercy, when their function is awful justice?

Still, in spite of these high considerations, what is thus assumed to be the legislative will is disobeyed every time an insane person, or an infant below the age of legal capacity, is set at the bar of a court for trial. There is no exception, and no complaint that the judges act in contempt of the legislative authority. But there are localities in which—not always, but now and then, and not in accordance with any intelligible rule yet discovered—the judges, when an unfortunate person who has done the best he could, yet has been misled as to some fact, is brought before them, having violated the letter of the statute by *act*, yet not by *intent*, resort to the high considerations, and turn him over to such mercy as he can find in the prosecuting officer or the governor. The legislative will, they tell us, is plain. The prosecuting officer may disregard it, but the judges

should do better, and mind. Or, if the governor chooses, he may accomplish by the pardoning power what he could not by his veto—the annulling of the legislative will.

Now, adapting the before-quoted language of Hoar, J., to this sort of judicial decision, we have the following: "It is singular, indeed, that a man deficient in reason is protected from criminal responsibility for violating the letter of a statute, and another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty."

The jumble comes from an entire ignoring of a familiar and well-settled rule of statutory interpretation. It is, as expressed by the present writer in another connection, that "whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law."* So that as an insane person will go free who does a thing forbidden by the common law, in like manner he will when the thing done is contrary to a statutory inhibition. And, as one of sound mind will not be punished at the common law if, being circumspect and careful to obey the law, he is misled concerning facts and does the thing which he should were the facts what he believes them to be, so neither will he be punished under a statute. The common-law doctrines are applied to a statutory offence the same as to an offence at common law.

It will be helpful to go for illustrations to two cases, in each of which the true doctrine appears. A statute of the United States declared that "any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter." And it was ruled to be no defence for such a person that his misconduct proceeded from ignorance of the business. "He should not have engaged in a duty so perilous as that of an engineer when he was conscious that he was incompetent." † Here was the wicked mind, and the common-

* Bishop's Stat. Cr., sec. 139.

† United States v. Taylor, 5 McLean, 242, 246.

law rule, simple and pure, was applied to the indictment under the statute the same as to an indictment at common law.

So likewise it was in the following case, which resulted differently. A statute required the masters of steamboats passing from one port to another, where a post-office is established, to deliver to the post-master in the latter place within a specified time after arrival, all letters and packets destined for the place. But it was held that if, for example, a letter is put into the hands of his clerk, or otherwise conveyed on board, yet not within his personal control, and he has no knowledge of it, this ignorance of fact will excuse the non-delivery of it to the post-master, notwithstanding the unqualified terms of the statute. Here, the reader perceives, there was an ignorance of fact which proceeded from no negligence or other culpability; and, therefore, the common-law rule, applied to the statute, screened from guilt the party who had committed a formal violation of the statutory command. "It is not to be supposed," said Johnson, J., "that it was the intention of the law-maker to inflict a penalty upon the master of a steamboat in a case where he was ignorant that a letter had been brought upon the boat, either by the clerk or any person employed on board, and had not the means of ascertaining the fact by the use of reasonable diligence. This would be little less unjust than the disreputable device of the Roman tyrant who placed his laws and edicts on high pillars, so as to prevent the people from reading them, the more effectually to ensnare and bend the people to his purposes." *

Let us now see how the doctrine is put by a court in a moment of forgetfulness of the rules of statutory interpretation. A statute in Massachusetts made it polygamy and heavily punishable "if any person who has a former husband or wife living shall marry another person," except in particular circumstances pointed out. † Does this forbid marriage after the former husband or wife is dead, in a case not within the exceptions of the statute? No one pretends that it does. Then, if a married woman has an insane delusion that her husband is dead, and, under its influence, marries another, the adjudged law in Massachusetts,

the same as elsewhere, holds her free from guilt. But is not an insane woman a "person?" Every court deems her to be. And the sophistical argument is that, as such a case as this is within the exact terms of the statute, the insane woman must be punished by the court or remitted to the governor for his pardon. The Legislature has spoken, and must be obeyed!

The answer, and the only answer to such a suggestion, is the one already given, namely, that every statute is to be construed as limited by the rules of the unwritten law; and in this case, as the woman without her own fault supposed her husband to be dead, she is to be judged on a question of crime the same as though he were so. In other words, as the unwritten law requires a criminal intent, so therefore does the statute. And an insane person can have no criminal intent.

In this condition of the law a married woman was left by her husband, who did not return, under circumstances inducing the honest belief that he was dead. So, in due time, she married another man, whom she instantly left on hearing that her husband was alive. She was indicted for polygamy, and the court held that nothing which these facts tended to prove would constitute a defence. The case differs, as we have seen, in no essential particular from one of insane delusion, in which the doctrine of the same court is directly the reverse. Said the learned judge: "It was urged in the argument that, where there is no criminal intent, there can be no guilt; and, if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does, he of course intends to do. If the statute had made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and, as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven

* *United States v. Beatty*, Hemp. 487, 496.

† *Rev. Stat. Mass.* 1836, ch. 130, sec. 2.

years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits.*

Here is a jumble: "If the statute," says the judge, "has made it criminal to do any act under particular circumstances"—that is, to marry a second husband *while the former one is living*—"the party voluntarily doing that act is chargeable with the criminal intent of doing it." But in fact, as the court admitted, this woman did not intend to do what the statute forbids. Her intent was to marry a second husband, her former husband being dead. The statute did not forbid this. It was a very different thing from the intent to marry again, her former husband being alive. But the judge tells us that the statute has prescribed "what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact," should it afterward appear that he was alive. Insanity is not set down in the statute among the evidences; hence, if this view is correct, an insane person marrying in such circumstances should be punished. But, no; we all see that the court would not hold this. The act of the insane person was not "voluntary;" it was impelled by disease. Neither was the act of the woman marrying under mistake "voluntary;" it was impelled by the mistake. This is so even in civil affairs; for, if one enters into a contract through mistake of fact, there is no "voluntary" concord of minds, and the formal undertaking is not binding. The act is of the same sort as the constable's is in arresting a person supposed to be drunk, while he is not. The mistake caused it. Nor did the learned judge further intimate that the seven years' absence is the only evidence which can ever be received of the death of an absent person. Suppose a husband is riding on a train of cars, and it is thrown down an embankment, and he is killed. His mangled body is taken back to the widow, and she buries it. A year afterward she marries again, but she is indicted for polygamy. This court would not hold that she could prove the death of the absent husband

only by showing a seven years' absence, so that she must go to prison for remarrying, while her former husband was known to be buried. But suppose the body to have been greatly mangled, yet the identification was satisfactory to all, and it should afterward appear to have been the body of some other person, while the real husband ran away and concealed himself. Here was evidence adequate in any court; and, in this case of mistake, the intent of the woman was precisely the same as in the case of actual death. She proceeded cautiously and honestly; she meant to obey the law, not to break it; and the central, fundamental principle of our criminal jurisprudence forbids that she should be punished. The statute screens the woman who does not know whether her former husband is dead or alive, if his absence has continued seven years. If she knows he is dead, she may at once marry. And, if there is an unavoidable mistake in such knowledge, she is still not to be punished for what she could not avoid. Nor could the Massachusetts court, in the actual case we have been considering, so blind itself by sophistry as to come to any other conclusion; for the case was continued to allow the woman to apply to the governor for a pardon, which was procured and pleaded, and then she was discharged. But, if the court interpreted aright the legislative will, with what propriety could the governor frustrate it, or the court connive at its frustration? A pardon, as well as a judicial judgment, may be wrongly granted. And it is not a just function of the pardoning power to annul what the Legislature has intentionally established.

In the law, precedents are so prevailing that, unless a false step is pointed out by some one who can succeed in arresting the attention of the judges, it almost necessarily leads to another. So it was in Massachusetts. I shall not attempt to trace the whole course of subsequent erratic *dicta* on this subject of mistake of fact in criminal cases, including one or two or more actual decisions contrary to sound doctrine, but something further seems desirable. The case of the arrest by a police-officer, the decision in which was right, was subsequent to this one of polygamy. Subsequent, also, were the following:

The General Statutes of Massachusetts provide that "whoever commits adultery shall be pun-

* The Commonwealth v. Mash, 7 Metc. 472, 474.

ished" in a way pointed out.* A woman married and lived awhile with her husband, but his habits were dissipated and he did not provide for her, so that she was compelled to leave him. She read in the newspapers of the killing of a man of his exact name, in a drunken row, and had no suspicion that the person killed could be any other than her husband. Thereupon she represented herself to be a widow. Eleven years after she last saw or heard from him, she and another man intermarried, both acting in absolutely good faith, with no doubt of the death of the former husband. But, in fact, he was alive, and the second husband was indicted for adultery committed by cohabiting under the second marriage. He was convicted, and the court held the conviction to be right.† He had exerted his best faculties to obey the law; the supposed widowed woman had waited the very decent time of eleven years; he had done what the best judge on the bench would have done if he, too, had been single, and had loved her; but all was of no avail. The majesty of the law must not be snubbed. There is some advantage in Massachusetts in being insane. If this man had been blessed with a mere insane delusion that the supposed facts were true, while the woman was cohabiting with her first husband, and had married her and cohabited with her also, he would have been "all right."

I am not aware of any Massachusetts case which better merits the fame of key-stone in the new arch than the one last cited.

A man was indicted for being a common seller of intoxicating liquor, contrary to the terms of a statute which were: "Whoever is a manufacturer of spirituous or intoxicating liquor for sale, or a common seller thereof, shall" be punished in a way pointed out.‡ He offered to prove that the article sold was bought by him for non-intoxicating beer, that he believed it to be such, and had no reason to suppose it to be otherwise. This evidence was rejected; he was convicted, and the court held the conviction to be right. The learned judge observed that this "is not one of those cases in which it is necessary to allege and prove that the person charged with the offence knew the illegal character of

his act." Of course, this is so. The indictment need not allege, or the evidence show, that the defendant was not under seven years of age, or was not insane; yet affirmative proof of either would be adequate in defence. Neither, added the judge, was this a case "in which a want of such knowledge would avail him in defence." If the want of knowledge proceeded from carelessness, or a will to disobey the statute or do any other wrong, or an indifference to its commands, this utterance, thus modified, would accord with the general doctrine prevailing the criminal law. But, if the mistake arose out of a proper enquiry, prompted by a purpose to obey the statute and do all things lawfully and well, it ought to excuse the person misled thereby. Yet the learned judge continues: "If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which was sold." This is a different doctrine from that laid down where an officer arrested a man believed to be drunk, while he was not. So, probably, thought the judge while he proceeded: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law, he incurs the penalty." Thus the case appears to be distinguished from the one of arrest. There was for the distinction no law except what reposes in the breast of a judge. But what a jumble! Whence comes the idea that a legislature creating a statute, and knowing that, by fundamental doctrine the world over, there can be no crime without a criminal intent, proceeds "without reference to the intent or purpose," unless the reference is in the form of words? Let us assume that the real meaning of the Legislature was indisputably to frame just such a statute as this, construed by the rules which prevail under the common law. By what form of words could it be done? The words actually employed are: "Whoever is a common seller of intoxicating liquor shall," etc. These words, by the common interpretation, would require the indictment simply to allege that the defendant did the unlawful act, thus making a *prima-facie* case against him, and the prosecutor to prove at the trial that he did it: leaving the accused

* Gen. Stat. Mass. 1860, ch. 165, sec. 3.

† The Commonwealth v. Thompson, 11 Allen, 23.

‡ Gen. Stat. Mass. 1860, ch. 86, sec. 31.

person to excuse himself if he could, the same as in a case of insanity, or of a child too young for crime. And what can be more reasonable then that this is what the Legislature means in any such case, even if we suppose its members to be ignorant of all rules of law? If the words are, instead of the above, "Whoever is a common seller of liquor which he knows to be intoxicating," the meaning is very different. The indictment must conform to the statute; and the prosecutor, to make a *prima-facie* case, must prove knowledge. And the same observation will apply to any other change of the like sort. Another method would be to introduce a clause that "this act shall be construed by the courts in accordance with the fundamental principles of the law." But, without such a clause, the courts are required to construe every statute in this way; so that this method would be nugatory. The result is that, in Massachusetts, there is no possible form of words whereby the Legislature can make the law which it desires. The learned judge proceeds, "The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases." But that rule comes from necessity. Shall, therefore, unnecessary hardship be inflicted by the court? It seems so. "And the hardship is no greater," he continues, "where the law imposes the duty to ascertain a fact." * This statute does not say it is the duty of the party to ascertain a fact. That is put on by the court, in the interpretation. And, to be consistent, the court should add that the statute makes it the duty of the party to be sane, and to be over seven years old; so that, if a child of six, or a lunatic, escaped from the hospital, should be caught at liquor-selling, such a person must be punished. The statute is general—"Whoever"—and it imposes on every person the duty to be old enough and sound enough in mind for crime.

[To be continued.]

Complaint is made in Chicago, that justices of the peace in that vicinity sign summonses in blank, and sell them to sewing machine companies by the dozen, to enable them to commence suits against poor women who are unable to pay for machines purchased.

* The Commonwealth v. Boynton, 2 Allen, 160.

DIGEST OF ENGLISH CASES.

[Continued from page 367.]

Company.—The articles of the I. Company, limited, authorized the directors named therein to appoint other directors, and provided that no person should be a director who was not the holder in his own right of stock to the amount of £50, and has not held the same for six months. J. was chosen a director by the board, and attended six meetings thereof, and took an active part in the proceedings; and his name appeared in the prospectus of the company as a director, but he never held any shares in the company. On winding-up proceedings, *held*, that he had never been a director, and could not be made a contributory. — *In re Percy & Kelly Nickel, Cobalt, & Chrome Iron Mining Co. Jenner's Case*, 7 Ch. D. 132.

2. Five persons formed a syndicate, for the purchase of a coal-mine of A., the owner. An agreement was made between I, one of the syndicate, and A., by which A. was to sell I. the mine for £66,000; of which £24,000 was to be cash, and £42,000 in paid-up shares in a company to be formed by I. for working the mine, with a capital of £200,000. The memorandum of association, signed by I. and another member of the syndicate, and five others, nominees of the syndicate, stated the capital to be twenty thousand £10 shares. The articles of association set forth that the property was to be acquired for and should belong to the persons named in the schedule of an agreement to be executed, and that the fifteen thousand shares set against their names were to be considered as fully paid up and allotted. I. subsequently declared himself a trustee for the company; and the agreement mentioned in the articles was executed and duly registered under the Companies Act, §25. This agreement stated that the property had been acquired by I. for A., the members of the syndicate, and their nominees, being the persons named in the schedule. There followed a declaration of trust by them for the company, and the statement that fifteen thousand shares were allotted to them as fully paid up. Besides the paid-up shares allotted him, A. bought three thousand five hundred and twenty shares from members of the syndicate. No shares were ever allotted beyond the fifteen thousand, and the company was voluntarily wound up. *Held*, reversing the decision of MALINS, V. C. that A.

could not be put on the list of contributories in respect of the three thousand five hundred and twenty shares purchased by him.—*In re Wedgwood Coal & Iron Co. Anderson's Case*, 7 Ch. D. 75.

3. A contract was made Oct. 15, 1875, between the plaintiff and the promoters of a proposed company. Dec. 16, 1875, the company came duly into existence, and subsequently ratified the contract, and acted on it. *Held*, that the company was liable on the contract.—*Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368.

4. Under a contract not registered as required by the Companies Act, 1867 (30 and 31 Vict. c. 131), shares in a limited company were allotted to the party with whom the company made the contract, and were duly registered by the company as such. The shares are subsequently transferred for value as fully paid up shares to N., who had no notice of any irregularity in their issue. On the winding up of the company, *held*, reversing the ruling of HALL, V. C., that the company was estopped to deny that the shares were fully paid up, and that the official liquidator could not have N. put upon the list of contributories as a holder of shares not fully paid up.—*In re Farmer's Pure Linseed Cake Co.*, 7 Ch. 533.

5. An unlimited company was formed in 1843, under a deed of settlement, in which it was provided that a shareholder should have no more than twenty votes, and that no share should be transferred to any person not first approved by the directors. A controversy arose as to the desirability of turning the company into a limited company; and the plaintiff, a large shareholder, having several thousand shares, transferred some shares by a *bona fide* sale to one E., and other shares to his nephew, to hold as trustee for himself. These transfers were made in order to secure more votes for the project which the plaintiff had in view. The directors refused to approve and accept the transferees, but without objecting to the character of the latter, or pretending that they were not proper persons to hold stock in the company. *Held*, that the directors should be ordered to approve the transfers, as they had no power to refuse, except for personal objection to the transferees. They could not refuse, because they did not approve of what they thought to be the object of the transfer.—*Moffatt v. Farquhar*, 7 Ch. D. 591.

Composition.—A purchaser from a debtor, who at the time of the purchase had filed a petition in bankruptcy, and whose creditors had accepted a composition, *held*, not bound to enquire whether the instalments provided for in the composition had all been paid, as the debtor has complete control of his property from the time of the composition until the creditors again take action under section 26 of the Bankrupt Act, and have him adjudged bankrupt.—*In re Kewley & Clayton's Contract*, 7 Ch. D. 615.

Consideration.—See *Guaranty*.

Construction.—1. Oct. 21, at 12.40 P.M., the excise officer discovered a dog belonging to the respondent, and without a license. At 1.10 the same day, the owner took out a license, which ran from the date hereof, &c. The dog law (30 Vict. c. 5) provides that "every license shall commence on the day" on which it is granted. *Held*, that the respondent had violated the act. *Campbell v. Strangeways*, 3 C. P. D. 105.

2. The word "paintings," used in a statute in the phrase "paintings, engravings, pictures," *held*, not to include colored working models, and designs for carpets and rugs, though painted by hand and by skilled persons, and each worth as much as £30 as models, but valueless as works of art.—*Woodward v. The London & North-western Railway Co.*, 3 Ex. D. 121.

Contingent Remainder.—See *Devise*.

Contract.—Plaintiff sued to recover £5 and a week's wages. The defendant set up a contract under which the plaintiff agreed to be conductor on defendant's tramway, and to deposit £5 as security for the performance of his duties; and, in case of his discharge for breach of the rules of the company, the £5 and his wages for the current week were to be retained as liquidated damages. The manager of the company was to be "sole judge between the company and the conductor" as to whether the same should be retained, and his certificate was to be binding and conclusive evidence in the courts as to the amount to be retained, and "should bar the conductor of all right to recover." Plaintiff was discharged for violating a rule of the company. *Held*, that the agreement was good, and the certificate of the manager that the forfeiture had been incurred was conclusive.—*The London Tramway Co., Limited, v. Bailey*, 3 Q. B. D. 217.

Contributory.—See *Company*, 2, 4.

Conveyance.—See *Vendor and Purchaser*.

Copyright.—O., a Frenchman, composed an opera, and had it performed for the first time March 10, 1869, in Paris. An arrangement of the score for the piano, and also one for the piano with voices, were made by S., a Frenchman, with O.'s consent, and published in Paris, March 28, 1869. In June, 1869, O. assigned the opera and copyright, with the right of publicly playing and performing the music in England, to the plaintiff, and delivered to him the score. June 9, 1869, a copy of the piano arrangement was given to the registration officers, and the opera was registered under the Copyright Act (5 & 6 Vict. c. 45) and the International Copyright Act (7 Vict. c. 12), as follows: Title of the opera; name of the author, O.; name of proprietor of the copyright, O. (given as "proprietor of the copyright in the music, and of the right of publicly performing such music"). Time of first publication, "March 28, 1869" (the time of publication of the piano arrangement by S.); and time of first representation, "March 10, 1869" (the time the opera itself was first played in Paris). The title of the copy of the piano arrangement deposited consisted of the title of the opera, with the addition of a statement as to the piano arrangement by S. No other mention of S. appeared in the registration. In August following, some separate instrumental parts of the opera were published, and no copy thereof delivered to the registration officers; but the rest remained unpublished. Subsequently, the defendant announced an opera in English, with the same name, music by O., and brought it out in London. The music as played was substantially as given in the arrangement by S. *Held*, reversing the decision of Bacon, V. C., that the registration as made protected the opera, and the defendant was guilty of an infringement.—*Boosey v. Fairlie*, 7 Ch. D. 301.

Costs.—See *Trust*, 2.

Covenant.—1. Plaintiff and another sold the defendant a lot of land, and in the deed defendant covenanted that no building to be erected upon the land should at any time "be used or occupied otherwise than as and for a private residence only, and not for purposes of trade." The lot was one of several contiguous lots, all sold under deeds containing a like covenant; and on one lot the plaintiff himself had built a private residence. The defendant proposed to

erect on his lot a building for the accommodation of one hundred girls, belonging to a charitable institution for missionaries' daughters, and supported by contributions. There was evidence that the plaintiff had permitted a small school to be kept in one of the other houses. *Held*, reversing the decision of Bacon, V. C., that the defendant had violated the covenant, and that the permission for the school in the other house did not amount to a waiver by the plaintiff of the covenant in defendant's case. Injunction granted.—*German v. Chapman*, 7 Ch. D. 271.

2. *Held*, that a covenant in a lease of a dwelling-house in London, not to assign without the consent of the lessor, was not a "usual covenant." *Haines v. Burnett*, (27 Beav. 500) considered overruled. *Hampshire v. Wickens*, 7 Ch. D. 555.

3. The assignee of a lease had notice of a restrictive covenant on the property binding upon his assignor. *Held*, that the covenant was binding on him in equity. *Keppell v. Bailey* (2 My. & K. 517) considered overruled.—*Luker v. Dennis*, 7 Ch. D. 227.

4. The assignee of land on which there is a covenant is in exactly the same position as if he were a party to the covenant, in case he had notice of it.—*Richards v. Revitt*, 7 Ch. D. 224.

5. By an agreement for the purchase of a public house, the plaintiff agreed to assume the lease thereof at a rent named, "subject . . . to the performance of the covenants" therein, "such covenants being common and usual in leases of public-houses." The said lease contained the clause: "Provided always, and these presents are upon this express condition, that all underleases and deeds," made during the term, "shall be left with the solicitor . . . of the ground landlord, . . . for the purpose of registration by him, and a fee of one guinea paid to him" therefor. Then followed a provision for re-entry for breach or non-performance of any of the "covenants or other stipulations." The jury found this clause was not a "common and usual covenant." *Held*, that the purchaser was not bound to specific performance, though the said clause might not be, in strictness, a "covenant."—*Brookes v. Drysdale*, 3 C. P. D. 52.

See *Lease*.

Damages.—See *Ancient Lights*.

Debt.—See *Will*, 3.

Dead.—See *Covenant*, 1.

Delivery.—See *Vendor's Lien*.

Demurrage.—A cargo was shipped under several bills of lading, one of which, indorsed to the defendants, contained the following: "Three working days to discharge the whole cargo, or £30 sterling per day demurrage." The defendants were ready to take their goods out within the time; but, their goods being at the bottom, they had to wait for other consignees to remove theirs, so that the three days had passed before their goods were out. In a second case, the facts were as above; and, in addition thereto, the charter-party provided that fourteen days should be allowed for loading and unloading, and ten days for demurrage, at £35 a day. One of the several bills of lading was indorsed to the defendants, and contained the phrase, "paying freight . . . and all other conditions, as per charter-party." *Held*, that in each case the defendants were liable for demurrage.—*Straker v. Kidd & Co. Porteus et al. v. Watney et al.*, 3 Q. B. D. 223.

Devise.—1. A testator devised his real estate to trustees, their heirs and assigns, to hold to them for the use of B. for life, and afterwards to the use of such children of B. as should attain the age of twenty-one years. B. was directed to keep the premises in repair during his life. The trustees were empowered to apply the income of the portion of an infant devisee for his or her benefit during minority, or to pay the income over to such devisee's guardian, without responsibility for its application; and they were empowered to use the principal for the advancement of such infant before his attaining twenty-one, if they thought best. B. died leaving four children, one an infant. *Held*, that the trustees took a legal estate in the property; and, whether B.'s life-estate was legal or equitable, B.'s children took equitable estates, and, consequently, the infant's estate did not cease on B.'s death during his minority.—*Berry v. Berry*, 7 Ch. D. 657.

2. Devise to trustees, to the use of testator's son W. for life, and upon W.'s death without issue male to sell and pay the proceeds unto such one or more of testator's "children as might be living at the decease of his said son W., without male issue as aforesaid, and the issue of such of his said children as might be

then dead, leaving issue," such issue to take *per stirpes* and not *per capita*. The testator died in 1840, and left W. and two other children living at his death. W. died in 1876 without issue. One of the other children died in 1872, having had two children, one of whom died in 1861, and the other is still living. On the question whether the child dying in 1861 before her parent took under the will, *held*, that the trust was an original gift, and said deceased child took according to the rule that "the issue of children take without regard to the question whether they (the issue) do or do not survive the parent, if any issue survive the parent." *Dictum* of Kindersley, V. C., in *Lamphier v. Buck*, (2 Dr. & Sm. 499), disallowed.—*In re Smith's Trusts*, 7 Ch. D. 665.

3. A testator devised copyholds held of the manors of Y., U., and I., to trustees, to the use of A. for life, remainder to the trustees to preserve contingent remainders, remainder to the use of A.'s children and their or his heirs, remainder to testator's grandson S. for life, remainder to the trustees to preserve contingent remainders, remainder to S.'s children, the plaintiffs. By a custom of the manors of Y., U., and I., the tenant can hold for life only, with power to nominate, by will or by deed, his successor or successors; and, if he nominates more than one, the survivor may nominate his successor. In a codicil, the testator, after stating that it had been found that his said copyhold estates were within the manors of U. and I., directed that the trustees should hold his said estates situated in those manors for the trusts of the will, so far as the customs of said manors would permit. But if the said customs forbade the "entails" made in the will, then the said A. and his nominees or successors should hold the said copyholds according to said customs. A. was admitted tenant of the copyhold of Y., and died without issue, having nominated the defendant B. his successor. The trustees were never admitted as tenants; one of them survived, and was made a defendant in the suit. *Held*, that, under the will, the trustees, and not A., ought to have been admitted as tenants of the copyholds held of Y.; that the limitations in the will were equitable interests, and were valid; and that A., having been admitted as tenant, held only as *quasi* trustee for the parties beneficially

interested, and that the defendant B. was accountable to the plaintiffs for the rents and profits of the copyhold of Y. since her admission thereto.—*Allen v. Bewsey*, 7 Ch. D. 453.

4. Devise of thirteen houses, a garden, and a pew in a church to testator's four sons, in equal shares, "to have and to hold subject to the following conditions: It is my will and desire" that the house be not disposed of or divided without the consent of the four sons, their heirs or assigns; that the garden be sold, if necessary, to meet contingent expenses; that, "until the before-mentioned distribution is made," the income shall come into one fund, and be among the sons; that, if there should be no "lawful distribution" during the life of the sons, the property should go to their issue, and if any of the sons died without issue, such son's widow should have the income during widowhood, and afterwards "it" should "devolve" to the survivors of the other sons, i.e. to testator's grandchildren, their heirs and assigns, share and share alike. The four sons were residuary legatees, absolutely. *Held*, that the sons took absolutely as tenants in common in fee, and the executory devise to the children was void.—*Shaw v. Ford*, 7 Ch. D. 669.

Director.—See *Company*, 1, 5.

Discretion.—See *Power*.

Distribution.—See *Perpetuity*; *Will*, 2.

Domicile.—J. M., born in Scotland in 1820, went to New South Wales in 1837, and carried on the business of sheep farmer. In 1851 he bought land in Queensland, and lived there regularly till four months after his marriage, in 1855. After a three years' visit to England, he lived three months on his land in Queensland, then three months at a hotel at Sydney, New South Wales; then in a house there, which he leased on a five years' lease. Then he built an expensive mansion-house at Sydney, in which his family resided till his death in 1866. He lived there except when away in Queensland on business or political duties. He died suddenly in Queensland, and at his request was buried there. *Held*, that he had lost his Scotch domicile, and his domicile in Queensland, and at his death had his domicile in New South Wales.—*Platt v. Attorney-General of New South Wales*, 3 App. Cas. 336.

See *Marriage*.

Dormant Partner.—See *Partnership*.

Easement.—Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party-wall, for a hundred years. More than twenty years ago, the plaintiffs turned their house into a coach factory, by taking out the inside, and erecting a brick smoke-stack on the line of their land next the defendants, and into which they inserted iron girders for the support of the upper stories of the factory. In excavating for a new building on the site of the old one, which the defendants had removed, they left an insufficient support for the smoke-stack, and it toppled over, carrying the factory with it. The defendants were not guilty of negligence in excavating. *Held* (Lush, J., diss.), that the defendants were not liable.—*Angus v. Dalton*, 3 Q. B. D. 85.

See *Ancient Lights*.

Evidence.—See *Contract*; *Negligence*; *Will*, 1.

Exchange, Bill of.—See *Bills and Notes*.

Factor.—H., a broker in tobacco, and importer thereof, left tobacco in bond in the K. warehouse, receiving in the usual course dock-warrants therefor. He then sold the tobacco to plaintiff, a tobacco manufacturer, who, not wishing to pay the duty before he needed to use the tobacco, left it in bond in H.'s name, and let H. retain the warrants, he being ignorant that such warrants were in practice issued. H., having possession of the warrants, pledged a portion of the tobacco to the defendants for a loan, and handed them the dock-warrants, which they surrendered to the warehouse, receiving new warrants therefor in their own name; and they had the goods transferred in the books of the warehouse from H.'s name into their own. Of all these transactions the plaintiff was ignorant. *Held*, that the plaintiff was entitled to the goods free from the claim of the defendants.—*Johnson v. The Crédit Lyonnais Company*. *Same v. Blumenthal*, 3 C. P. D. 32; s. c. 2 C. P. D. 224. See 40 & 41 Vict. c. 39.

Fire Insurance.—See *Insurance*, 1.

Foreign Exchange.—See *Bills and Notes*, 5.

Fraud.—See *Anticipation*; *Trust*, 2.

Freight.—See *Railway*.

[To be continued.]

CURRENT EVENTS.

QUEBEC.

THE LEGALITY OF ORANGE ASSOCIATIONS.—Considerable discussion has taken place during the past month concerning the legality of Orange Associations within the Province of Quebec. Those who doubted or denied the legality of such organizations were fortified in their position by the following opinion given by counsel learned in the law, at the request of the St. Patrick's Society of Montreal. We append the document, which has acquired historical interest and importance:—

MONTREAL, July 9, 1878.

Sir,—The St. Patrick's Society, of Montreal, placing full confidence in your eminent legal ability and impartial judgment as a lawyer, request you will give them, at the earliest possible moment, your opinion on the following case.

CASE.

An Association exists in Montreal, claiming to be an Orange Association or Lodge, and its chief officer, calling himself County Master, has directly or through some subordinate officer called upon the civic authorities for protection in connection with the intended procession of the Association through the streets of the city of Montreal on the 12th of July. The oath taken and subscribed by the members of the said Association is one not authorized by law, and, moreover, contains an engagement of secrecy not required by law.

The opinion of counsel is requested upon the following questions:—

1. Is the Association illegal under the 10th chapter of the Consolidated Statutes of Lower Canada, and if so, would such procession, should it take place, constitute an unlawful meeting?

2. Are parties, residents of the province or elsewhere, joining the procession in Montreal of such Association, although not members of the Association, equally liable as if they were members?

3. In case such assembly be unlawful, is it the right and duty of the conservators of the peace to disperse the same?

You may associate with you such other legal gentlemen as you may deem fit.

Your obedient servant,

M. Walsh,

EDWARD BERNARD, Esq., Q. C.

Cor. Sec.

OPINION.

1. By the 6th Section of Chapter 10 of the Consolidated Statutes of Lower Canada (1861), every Society or Association, the members whereof are, according to the rules thereof, or to any provision or any agreement for that purpose, required to keep secret the oaths or proceedings of such Society or Association, or to take any oath or engagement not required or authorized by law; and every society or association the members whereof or any of them take, or in any manner bind themselves by any such oath or engagement, or in consequence of being members of such society or association the members whereof or any of them take, subscribe or assent to any engagement of secrecy, test or declaration not required by law; and every society or association which is composed of different divisions or branches of or different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate or other officer elected or appointed by or for such part, or to act as an officer for such part, shall be deemed and taken to be unlawful combinations and confederacies. And by the 7th section, any person, who in breach of the provisions of the Act, shall be guilty of any such unlawful combination or confederacy and shall be convicted thereof, shall be imprisoned in the provincial penitentiary for a term not exceeding 7 years, nor less than 2 years, or to be imprisoned in the common jail or house of correction for any term less than 2 years. And by the 9th section, Freemasons under any Grand Lodge in the United Kingdom are exempt from the operation of the Act, and by the 29th Vic., chap. 46 (1865), the exemption is extended to Freemasons under the Grand Lodge of Canada.

The Orange Association referred to being bound by an oath not authorized by law, and containing an engagement of secrecy not required by law, we are of opinion that it is an unlawful combination and confederacy within the meaning of the said Act, chap. 10, of the Consolidated Statutes of Lower Canada, and consequently that any meeting of the Society, either in a building or in any of the streets of this city, or in any other place within this Province, is an unlawful meeting or assembly. The right thus to meet or assemble

being illegal, it necessarily follows that the walking together of such society in procession in the streets of Montreal on the twelfth instant will be unlawful.

2. Applying the principles of the common law, and in view of the express provisions of the second sub-section of Section 8 of the said Act, chap. 10, of the Consolidated Statutes of Lower Canada, we are of opinion that any persons, whether residing in the Province of Quebec or not, joining in the procession although not members of the said Orange Association would be equally liable, as if they were such members. The words of this sub-section are as follows:—"And every person who becomes a member of any such society or association, or acts as a member thereof, and every person who directly or indirectly maintains correspondence or intercourse with any such society or association, or with any division, branch, committee or other officer or member of such society or association, whether within or without this Province, as such, or who by contribution of money or otherwise aids, abets or supports such society, or any member or officer thereof, as such, shall be deemed guilty of an unlawful combination or confederation."

3. Holding as we do for the reasons above stated that the contemplated meeting and procession are unlawful, we are further of opinion that it is not only the right, but the duty of the conservators of the peace to suppress and disperse any such meeting and procession should they be held. The law on this subject cannot perhaps be better stated than in the following remarks of the Court, in the case of the Queen vs. Neale et al., 9 Carrington and Payne, 431:—"It is not only lawful for Magistrates to disperse an unlawful assembly, even when no riot has occurred, but, if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty."

STRACHAN BETHUNE, Q. C.

EDW. CARTER, Q. C.

THOS. W. RITCHIE, Q. C.

EDMUND BARNARD, Q. C.

MONTREAL, 10th July, 1878.

Acting on this advice, members of the Orange Association were on the 12th July arrested, and the whole question will probably have to be considered by the courts at an early date.

ENGLAND.

PAYING MONEY INTO COURT—CONTINGENT LIABILITY.—The London *Law Times* says:—"A defendant may deny his liability and pay money into court to provide against the contingency of being fixed with liability notwithstanding his denial. So the Court of Appeals has decided in *Borden v. Greenwood*, and another of the old pleading land-marks is ruthlessly swept away. There must have been some good reason which sustained the old rule to the contrary for so many years."

NOTICES OF NEW PUBLICATIONS.

"**SHORT STUDIES OF GREAT LAWYERS,**" by IRVING BROWNE. Weeds, Parsons & Co., Albany.

This is a republication of sketches originally printed in the *Albany Law Journal*. The author intends them rather as estimates of character than as biographies, but they embrace the most prominent events in the career of the distinguished men whose lives are noticed in the book, and for those who have not fuller and more complete biographies at hand, will serve as reliable and interesting information on the subject. Mr. Browne's style is polished and entertaining, the matter is skilfully selected and handled, and his book will make pleasant reading for the holidays. The worthies noticed in it are Coke, Mansfield, Kenyon, Thurlow, Loughborough, Ellenborough, Erskine, Eldon, Romilly, Abinger and Brougham of the mother country; and Parsons, Marshall, Kent, Pinkney, Wirt, Riker, Story, Webster, Walworth and Choate of the United States. The work, we may add, is beautifully printed and bound.

THE AMERICAN LAW REVIEW, for July, 1878; Boston, Little, Brown & Co.

The latest number of this valuable quarterly, which closes the 12th volume, is, as usual, carefully edited. The subjects discussed in the leading articles, with the exception of that on "Possession," are chiefly of local interest, but the rest of the contents will be generally useful. We are indebted to the *Review* for the latest English and United States decisions.

The Legal News.

VOL. I. AUGUST 10, 1878. No. 32.

PROPERTY OF FOREIGN SOVEREIGNS.

The English Court of Appeal, in a recent case, *Vavasour v. Krupp*, has re-affirmed the doctrine that the courts of England have no jurisdiction over the public property of a foreign sovereign. The facts were these: The Japanese government, through agents in London, bought in Germany and paid for some shells manufactured by Messrs. Krupp. The shells were brought to an English port for the purpose of being transhipped to Japan in some vessels of war which were being built in England for the Japanese government. The plaintiff complained that an English patent granted to him for the manufacture of projectiles was infringed by these shells being brought to England, and he obtained from the Master of the Rolls an interlocutory injunction restraining the delivery of the shells to any one but himself. The Mikado of Japan then intervened in the case, alleging that the shells were his public property as sovereign of Japan, and applied for an order that notwithstanding the injunction the shells might be delivered to him in that capacity. The Master of the Rolls granted the order, and the Court of Appeal has affirmed the decision, remarking "that it was clearly settled that the courts of England had no jurisdiction whatever over the public property of a foreign sovereign."

STATUS OF THE CHINESE IN THE UNITED STATES.

The application of Ah Yup, a native of China, to the United States District Court, California, to be naturalized, led to an interesting argument on the status of the Chinese in the United States. The petition being a novel one, the court invited the members of the bar to make any suggestions which occurred to them on either side of the question, and the hearing was a full one.

The old naturalization law of the United States provided that "any alien, being a free white person, may be admitted to become a citi-

zen." This was amended in 1870 at the time of the abolition of slavery, by adding the following clause; "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." After some further changes, the law as it stands at present is defined by an Act of Feb. 18, 1875, which reads as follows: "The provisions of this title shall apply to aliens, being free white persons, and to persons of African descent." The whole question, then, resolved itself into this: Are natives of China, of the Mongolian race, "white persons?" The Judge answered this question in the negative, and Ah Yup's petition was refused. We have not space for the judgment in full, but an extract from Judge Sawyer's remarks will show the reasoning by which he arrived at his conclusion. "Words in a statute," he said, "other than technical terms, should be taken in their ordinary sense. The words 'white person,' as well argued by petitioner's counsel, taken in a strict literal sense, constitute a very indefinite description of a class of persons where none can be said to be literally white, and those called white may be found of every shade, from the lightest blonde to the most swarthy brunette. But these words, in this country, at least, have undoubtedly acquired a well-settled meaning in popular speech, and they are constantly used in the sense so acquired in the literature of the country as well as in common parlance. As ordinarily used anywhere in the United States, one would scarcely fail to understand the party employing the words 'a white person' would intend a person of the Caucasian race. In speaking of the various classifications of races, Webster, in his dictionary, says: 'The common classification is that of Blumenbach, who makes five. First, the Caucasian or white race, to which belong the greater part of the European nations and those of Western Asia; second, the Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; third, the Ethiopian, or negro (black) race, occupying all Africa except the north; fourth, the American, or red race, containing the Indians of North and South America; and fifth, the Malay, or brown race, and occupying the islands of the Indian Archipelago,' etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of

complexion, hair and skull. Linneus makes four divisions, founded on the color of the skin,—First, European, whitish; second, American, coppery; third, Asiatic, tawny; and fourth, African, black. Cuvier makes three,—Caucasian, Mongol, negro. Others make many more, but none include the white or Caucasian with the Mongolian or yellow race; and none of those classifications, recognising color as one of the distinguishing characteristics, include the Mongolian in the white or whitish race.

"Neither in popular language, in literature, nor in scientific literature do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the laws adopted for the determination and classification of the races."

The opinion is evidently in accordance with the law, for the report of congressional proceedings at the time the Act was under discussion, leaves no doubt as to the intention of the legislature. The late Senator Sumner in 1870, endeavored to have the word "white" struck out of the naturalisation law, but the alteration was opposed on the very ground that it would admit the Chinese to citizenship. Senator Morton expressly declared—"This amendment involves the whole Chinese problem," etc. The opponents of Chinese naturalisation gained the victory. The Judge, therefore, in refusing the petition, was only obeying the will of the legislature, and until the law is changed, the judgment must stand unchallenged.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

[Continued from p. 366.]

I might go on with these cases—but why? If the reader wishes to see more of the doctrine and of the authorities, he can find the references, with some further views, elsewhere.*

Nor need we here enquire how far this Massachusetts doctrine has found favor in other

states. I have seen no case elsewhere in which it has been adopted on any thoughtful consideration or investigation. There is a Rhode Island case in which one was indicted for selling adulterated milk, contrary to a statute prohibiting such sale in general terms; and, said the learned judge of the appellate court, the defendant asked the instruction to be given the jury "that there must be evidence of a guilty intent on the part of the defendant, and of a guilty knowledge." This request was refused, and the court very properly held the refusal to be right. The learned judge, however, added: "Our statute, in that provision of it under which this indictment was found, does not essentially differ from the statute of Massachusetts; and in Massachusetts, previous to the enactment of our statute, the Supreme Judicial Court had determined that a person might be convicted although he had no knowledge of the adulteration; the intent of the Legislature being that the seller of milk should take upon himself the risk of knowing that the article he offers for sale is not adulterated." For this observation he refers to a case,* from one of the reporter's head-notes to which he copies it; but the court simply holds that guilty knowledge need not be alleged and proved against a defendant, to convict him. This determination was right, though made in Massachusetts; and the learned judge well adds: "We think our statute should receive the same construction." † Whether this or any other court, will at a future period follow the Massachusetts doctrine, where it departs from what is generally held elsewhere, no one can tell in advance. There is a single Wisconsin case, not much considered, adopting more nearly the Massachusetts view. ‡ But, as I have said, the general doctrine is the other way. §

The capacity of the human mind to adapt itself to any sort of sinuous position is a remarkable phenomenon in man. Without it, who could be happy in our crooked world? We all admire Blackstone; and specially pleasing it is to note, in reading him, how, in his eye, everything connected with the English law is rosy

* The Commonwealth v. Farren, 9 Allen, 489.

† The State v. Smith, 10 R. I. 258.

‡ The State v. Hertfel, 24 Wis. 60. As to which, see Bishop's Stat. Cr., sec. 1022, note.

§ See the places cited a few notes back, where the authorities will be found collected.

* 1 Bishop's Cr. Law, secs. 297—312, 440, 441, 874, 1074—1076; 2 *Id.* 664, 693, 922; Bishop's Stat. Cr., secs. 132, 31, 355—359, 632, 663—665, 730, 820—825, 877; 12 Am. Law Rev. 469, the article to be mentioned in my text.

—not an absurdity in it, but is "the perfection of reason." And a judge, under the rule of *stare decisis*—how could he get on if he did not occasionally see from the back side of his head? How, in Massachusetts, could a prosecuting officer?

An excellent and clear-headed lawyer and upright man, who for several years served as prosecuting officer in the most populous county in Massachusetts, has just informed the public through what contortions, in this state, such an officer can so adapt himself to the adjudications on the present subject as to render himself comfortable, if not absolutely happy. He commences an article in the *American Law Review** with the following formulated eclipse, so absolutely total that even the stars appear: "In this country, at least, it is still an open question whether a person who honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime, can properly be convicted." The stars here revealed are two, named Peter and John, who demanded of the legal authorities, "Whether it be right, in the sight of God, to hearken unto you more than unto God, judge ye;"† John Rogers, who was burned at the stake, with nine small children and one at the breast; John Brown, hung at Harper's Ferry, whose "soul is marching on;" and various others whose names are not important in this connection. They raised the question of *ethics*, as to the comparative obligation of the law of the land and the law of God. But that it is, or ever was, in this country, or any other, a question in the criminal law of the land, whether or not one who violates it, even by honestly doing "that which appears to him to be lawful, right, and proper," "can properly be convicted," is a contortion, pleasant undoubtedly to him who is compelled to it, but startling to the looker-on. Well, he proceeds to picture Massachusetts standing manfully on the side of the law! Those who disobey the criminal law in this state "can properly be convicted," however proper in their own eyes may be the thing which they do. To sustain this proposition he states or cites various cases, of the sort which I have already commented on, wherein the court

ignores the most familiar rules of statutory interpretation; mingled with other cases relating to pleading and evidence, wherein the universal doctrine was followed, yet not distinguishing them from the former, and accepting them as upholding the same proposition. In this way he makes it appear that Rhode Island, in the case which I have already stated, stands side by side with Massachusetts. No one knows but she will—she has not done it yet. And something like the same thing appears as to Connecticut and Kentucky.

The contortion need not consist of any intentional unfairness, nor do I discover any in the writer I am now considering. He gives, with entire candor, what he esteems to be the authorities on the other side, namely, to the proposition which, in his language, is that, if a man "honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime," he cannot "properly be convicted." He admits that the courts of some of our states have placed themselves squarely on this doctrine, and that it has considerable English support. But, candid as he is, he cannot bring himself fully to the conclusion that England stands on it; and, on the whole, he places her on the side of law and order! For this he cites several cases, particularly some penal actions, in which the law was permitted to prevail over the honest convictions of the party; ignoring the fact that a penal action is not a criminal proceeding, but a civil, and that by all opinions the doctrine of the criminal intent does not necessarily prevail in civil cases as in criminal. I might add that there are cases criminal in form, but civil in their nature and purposes, in which being governed by the rules of civil causes, it does not prevail.* "In fact," he concludes, "we doubt whether any court could be found to assert the doctrine of the *mens rea* in the face of the statute distinctly dispensing with it. It is for the Legislature to judge whether the injury to the public from the indulgence of any particular practice is so great as to justify the risk of possible injustice to an individual in providing for its punishment. Moreover, should such a case of injustice arise, though the courts cannot

* 12 Am. Law Rev. 400.

† Acts iv, 19.

* 1 Bishop's Cr. Law, 6th ed., secs. 1074—1076, and the places there referred to.

help it, an appeal to the prosecuting officer, or, in the last resort, to the executive clemency, could not fail to be effectual. Meanwhile, the person who persists in a prohibited practice, which he knows may be injurious or fraudulent as against the public—a fact which he may, if he will, determine—whereby he is to profit at the risk of the public, is not in a position to assert his want of wrongful intent. The peril should be his, as well as that of his poisoned or defrauded victim."

Here is a close worthy of the beginning. And no judge ever adorned a bench who could do better at throwing intellectual mud in defence of a bad *stare decisis*. Was there ever, in fact, a Legislature so demented as, by express enactment, to dispense with the criminal intent in crime? Has it been so much as proposed to punish insane men and sucking babes as criminals? Did any law-maker, any demagogue on the stump, ever recommend the passage of a law that men and women who marry shall do it at the risk of being sent to the penitentiary should a latent impediment, unsuspected and impossible to be discovered at the time, appear afterward? It takes a bench of wise judges, in a state whose ripened jurisprudence rises golden above the green of the younger states, to do that.

Let us see, a little, how this stands: A police-officer, if he arrests a man for being drunk when he is not, is excused; because, as the foregoing explanations have shown, he was required to act, and he should not be punished when his intent accorded with his duty. That, it is agreed on all sides, was right. But he was not obliged to become a police-officer. Both scripture and the law of nature command that man shall replenish the earth. Our laws encourage people in doing this, quite as much as they do in becoming police-officers. Not long would police-officers be required, not long would courts, if the places of the present inhabitants passing away were not filled. Well, a man has made up his mind to do his part toward keeping up the population. But, in Massachusetts, fornication and adultery are both indictable; the law requires him to marry and live by his marriage vows. Yet, let him be as circumspect as he may, he cannot take the first step toward population without being in peril of penitentiary. If he chooses fornication,

he must be punished; if adultery, he must be; if he selects lawful marriage as the means, he is liable to bring up at the same end. Should he choose a widow, her former husband may not, after all, be dead. Should his choice be a maid, she may have indulged in the fun of a mock marriage, supposed to be of no binding force, never cohabited under, and never heard of by him, yet held afterward, by the courts, to be valid. So the door of the state prison swings open, and in he must walk! Well, if he cannot in safety become a married man, he may find refuge in the badge of a police-officer. If he will "indulge" in the evil of an honest endeavour to provide inhabitants for police-officers to look after fifty years hence—why, "the peril should be his!"

We have already been told that the creating of a crime out of an endeavour to obey the law is productive of no more hardship than sometimes proceeds from the rule of a presumed knowledge of the law. And, as a remedy for all, we have "the executive clemency." The ship glides on over the blue sea; the captain is on deck and his young bride by his side. "You look pensive, love," she says. "I was thinking of jurisprudence; I learned it a little while after the happy day when we were married." "And what is jurisprudence? Teach jurisprudence to me." "Do you not think," he replies, "it was very hard for that sailor-boy to drop from the jib-boom yesterday, and be drowned?" "Yes;" and she dashes the tear from her eye. "And would it be any harder if I should throw you overboard?" "Dying would be no harder." Then, tossing her over, he continues, as she lifts up her cry for help, "The Governor, my dear, will save you with his whale, as in the case of Jonah." Great is Jurisprudence!

III. Remedies for Judicial Blunders.—No man ever lived without committing a blunder. Nor was there ever a wise man unwilling to review his steps and correct his mistakes.

These propositions are applicable to ordinary life; but, by some opinions, they properly admit of two exceptions—in first-class journalism, error in a newspaper being impossible; and in judicial affairs, where "the perfection of reason" prevails. It is within the scope of this article to consider only the latter.

If we look at this question in a spirit of candor, we shall see that, of necessity, and without

imputing to the men who occupy judicial positions any want of learning, ability, or integrity, they must commit numerous errors of judicial opinion.* However eminent in learning and ability, they still are men; and to err is human. But, besides this, in our age and country, judgments, on questions improperly or imperfectly argued, are often required to be pronounced in haste by men whose brains are overworked and who have no time to supply from their own industry the deficiencies of counsel. Formerly, in the mother country, cases were argued at full length by counsel able, and amply prepared; then, if the judges were in doubt, they heard a second argument, and sometimes even a third. Now, in our country, the one only argument is limited in time by a rule of court—often the arguing counsel have neither any natural nor acquired qualification for their task, and not unfrequently the judges come to consider of their decision after the argument, whether poor or good, is forgotten, and their memories and thoughts have become burdened with other and different questions. The embarrassment arising from the latter fact is so great that, it is said, there is now and then a judge who deems it superfluous to listen to any argument; so, while the arguing is in form being had, he occupies his thoughts with something else, and, in effect, decides the case without argument.

In a recent address to the Chicago Bar Association, Judge Dillon put the difficulties of the situation in a very clear and convincing light. Some of his golden words, which ought to be printed in the largest and fairest type, and hung up in every legislative hall and every courtroom, are the following: "Forty state courts of last resort, and as many Federal courts sitting in the same states with concurrent jurisdiction, cannot, without great learning and infinite care, build up a harmonious and symmetrical system of jurisprudence. The difficulty in the way of the judges is seriously increased by the burdensome and exacting pressure of their duties. They lack, in general, neither learning nor industry; their chief want is the want of time. . . . With so much work, and with so little time for deliberate and sedate consideration, mistakes must be numerous. But the fault lies not so much with the overworked judges as with the faulty system

which imposes such vast labors upon them. The state judges, generally, are almost equally overburdened [with the Federal]. Hence we inevitably have a constantly-increasing mass of decisions, state and Federal, many of which must be erroneous, and which, while standing as precedents, bear pernicious fruits."*

The first duty, then, is legislative. Yet, in a country like ours, a duty of this sort is seldom done until its necessity is forced upon the attention of the unthinking, as well as the thinking, classes of the community. While men, esteemed competent, can be found to fill the judicial places who will consent to work under pressure, and pull to the crack of the whip, the argument that judges are not beasts, and that the public interests are not subserved by treating them as such, will have little avail.

What, then, can our judges do? They can refuse to decide causes under pressure; and, if the public do not like it, let the public employ other men. This will, at first, increase the evil; but the temporary acceleration of the disease will lead to the permanent cure.

The multiplication of ill-fitted and incompetent lawyers is to some degree the product of legislative folly; but, to the full extent possible with the courts, they should control and limit it. The ebb of this tide of folly already begins to appear. The courts need the assistance of competent counsel—the more in proportion to the pressure of business upon them. But, beyond this, a judge, having it in his power to admit or reject a candidate for the bar, should pause long before inflicting on an innocent and well-meaning young man the great injury of inducing him to believe himself fitted for legal practice when he is not. In the majority of instances it will lead to the wreck of all his labors and his hopes.

But that to which I wish particularly to direct attention is the correction of errors already made. Not always is it properly competent for a court to overrule a wrong decision. If it has established a rule of property, and the affairs of the community have adjusted themselves to it, and have been for a considerable time conducted as it directs, the remedy should ordinarily come from the Legislature; because then there can be no divesting of vested rights. But there are various cases in which it is both just and proper

* 6 C. L. J. 34, 35.

blunder which makes a man a felon, or even a criminal of the lower grade, in recompense for his honest and faithful endeavor to obey the law which he is accused of breaking, is of this sort. The rule of *stare decisis* does not properly apply to such a case. There is no vested right which the correction of the error will divest. The state is not injured by a refusal to punish those who merit no punishment. If a wrong was inflicted on Mr. A. yesterday, with no correlative benefit to any individual or the public, it is a perversion of the rule of *stare decisis* to hold that, therefore, a like wrong must be inflicted by the judge on Mr. B. to-day. In criminal cases this suggestion is of a wide applicability and force—much exceeding what would be permissible in civil.

Now, this distinction is not always present in the minds either of practitioners or judges. And the question is what, practically, should be done when justice in a case before the court is obstructed by another case which ought to be overruled. To the judge, this question will present no difficulty—he will overrule the case. The embarrassment is with the practitioner at the bar.

The judge may say: "That point has been decided once, and I will not hear it argued again." At the same time, the true argument may not have been presented on the former occasion—the judicial understanding may not have comprehended the real difficulty; yet the erroneous decision may be far-reaching in its consequences; and in the language just quoted from Judge Dillon, it may, "while standing as a precedent, bear pernicious fruit." The practitioner can only do his best in such circumstances. Let him not attempt to entrap the court, but, stating the adverse decision or line of decisions fairly, press the tribunal for a reconsideration of the question; and, if he is refused, he will be happy in the remembrance of having done his duty.

The greatest difficulty is to obtain a correction of the error at the best time—namely, when it is fresh—and especially by the erring judge by whom it was made. Private communications with a judge on questions before him, or likely to arise, not in response to his own application for advisory help,* are pernicious, and they should not be allowed. Yet, if an intelli-

gent and upright bar abstains from such communications—as it will—this is a good which, like many others, may cast an evil shadow. A case is imperfectly or incompetently argued, no lawyer interposes as *amicus curie* (a good old practice which has become nearly obsolete), and a wrong decision follows. The mind of the judge leaps forward to other tasks, and no thought crosses it that he has blundered. The necessities of his position have isolated him from the friends who would gladly set him right.

Now and then it may happen that some lawyer, perhaps his friend, is writing a law book on the very subject, yet such a coincidence is rare. Will this person, who is properly not permitted to speak of the error in private, dare to do it in his book? Not often. Such a thing has been done, but only the sternest sense of public duty could prompt this trustee of all tests of private friendship. Were the judge a Mansfield or a Kent, the proceeding would be as safe as, in the interests of jurisprudence, it is always desirable. But even Judge Dillon, who says, in the above-quoted passage, that our judges "lack in general, neither learning nor industry," would admit that we have considerable numbers who are neither Mansfields nor Kents. Good and great as the majority are, all are men.

And a mind that does not tower considerably above the ordinary standard of able and learned men will, in general, take offence if a mistake is pointed out, under any circumstances, by any person, and prompted by whatever duty. Nor will one of this sort look when told of his error. His pride is wounded; and he will wound in turn, if he can, him whose hand was stretched out to bless.

Much more, therefore, are newspaper comments, and comments even in our legal periodicals, pointing out errors in contemporary decisions, of no benefit, as a general rule, to those by whom the errors were committed. But in our country, where judges of the highest courts are numbered by the hundred, such criticisms, in every appropriate place, are helpful to those not of the class who are criticised, and to the few of this class whose opinions carry the greatest weight. The latter may even retrace their own false steps. And those not criticised will thus

* Gaylor's App. 43 Conn. 82, 84.

be assisted to correct the mistakes of the others.

On the whole, however, there is no one method by which the good sought can be accomplished. Each should do what he can; and the result which one man could not attain, or to which one method would be inadequate, may be brought about by combined methods and many hands.

If our jurisprudence makes, in the future, the advances which all trust it will, those who come after us will see a more intelligent holding of the doctrine of *stare decisis* than now. And thereby many of the absurdities which haste and the lack of due argument have introduced into our adjudged law will disappear. It has been fortunate in all periods that the judges most adverse to revising past decisions have been the least competent ones, while the willing have been largely those who could best do this most difficult of judicial duties. Had it been the reverse, change would less often have been improvement. So it will necessarily be in the future. As strong men appear, they will tear down the rubbish while the weak lament, and erect in its place the firm and enduring.—JONAS P. BISHOP, in *Southern Law Review*.

DIGEST OF ENGLISH CASES.

[Concluded from page 370.]

Guaranty.—The wife of C., a retail trader, possessed of property in her own right, gave the plaintiff, with whom C. dealt, the following guaranty: "In consideration of you having, at my request, agreed to supply and furnish goods to C, I do hereby guarantee to you the sum of £500. This guaranty is to continue in force for the period of six years, and no longer."

Held, reversing the decision of Fry, J., that the guaranty did not cover sums due for goods supplied before its date, but was limited to goods sold after its date to the value of £500.—*Morrell v. Cowan*, 7 Ch. D. 151; s. c. 6 Ch. D. 166.

Husband and Wife.—See *Guaranty; Marriage*.

Infant.—Agreement between the appellants and the respondent, an infant, by which respondent was to work for appellant for five years, at certain weekly wages. There was a proviso, that if the appellants ceased to carry on their business, or found it necessary to reduce it, from their being unable to get

materials, or from accident, or strikes, or combination of workmen, or from any cause out of their control, they could terminate the contract on fourteen days' notice. In an action on this agreement by appellants for loss of service, the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), **held**, that the agreement was not in itself inequitable, but its character depended upon whether its provisions were common in such labor contracts at that time, upon the condition of trade, and upon whether the wages were a fair compensation for the infant's services,—all which circumstances were necessary to the construing of the contract.—*Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

Injunction.—See *Covenant*, 1.

Insurance.—1. Plaintiff insured his house, worth £1,500, for £1,600. The Board of Works subsequently took the property under statutory power; the price had been agreed, and the abstract of title furnished and accepted, when a fire destroyed the house. **Held**, that the dealings between the Board and the plaintiff did not affect the contract, and the defendants must pay £1,500, the value of the house.—*Collingridge v. The Royal Exchange Assurance Corporation*, 3 Q. B. D. 173.

2. Two ships belonging to the same owner collided, and one of them sank and became a total loss. The owner paid into court the amount of tonnage liability in respect of the ship in fault, under the provisions of the Merchant Shipping Acts. The underwriters on the ship lost claimed to be entitled to a portion of this, as they would have been had the ships belonged to different parties. **Held**, that their right in such case existed only through the owner of the ship insured, and not independently, and as he could not sue himself, they could not recover.—*Simpson v. Thomson*, 3 App. Cas. 279.

Intention.—See *Domicile*.

International Copyright.—See *Copyright*.

Jurisdiction.—See *Mortgage*.

Jury.—See *Bill of Lading; Negligence*.

Lease.—Plaintiff became the owner of a lease of two farms, at a rent of £310 per annum. The lease contained, *inter alia*, a covenant on the part of the lessee not to mow meadow-land more than once a year, and not to underlet any part of the premises without the consent in writing of the lessor; but such consent was not

to be withheld if the proposed sub-lessee was a respectable and responsible person. It was provided, that, if the lessee should wilfully fail to perform the covenants, or if he should become bankrupt, or make a composition with his creditors, or if execution should issue against him, the lessor might re-enter. Eight years before the expiration of the lease, plaintiff entered into negotiations with the defendant, a respectable and responsible person, for an underlease of one of the farms, on the terms under which he himself held it; and he stated that he paid £220 rent for it. An arrangement was made, accordingly, by which defendant was to have possession June 24. Before that time, defendant's solicitors had objected to the above provisions in the original lease, and had noted the same on the margin of a draft lease sent them by plaintiff's solicitors, in pursuance of the arrangement between plaintiff and defendant. They suggested a modification of the original lease. They did not object that plaintiff held no separate lease for the farm at the rent which he stated he paid. While the negotiations were pending, defendant, on June 24, took possession. Subsequently, the modifications not being procured, defendant refused the lease; and, in an action for specific performance, or for damages, it was held that taking possession was only evidence of a waiver of objection to the title, and could be rebutted; that, by not noting objection to the plaintiff's holding no separate lease at £220 rent, defendant had waived that; that, if the sub-lessee was a respectable and responsible person, the written consent of the lessor to the sub-lease was unnecessary; that the covenant against mowing meadow-land more than once a year was not an unusual covenant; but that the provision for re-entry on bankruptcy, &c., of the lessee was unusual, and the defendant was not bound to specific performance, nor liable in damages.—*Hyde v. Warden*, 3 Ex. D. 72.

See *Covenant*, 2, 3; *Specific Performance*, 1, 2, *Lien*.—See *Attorney and Client*, 2; *Vendor's Lien*.

Limitation of Liability.—See *Common Carrier*.

Loan.—See *Partnership*.

Marine Insurance.—See *Insurance*, 2.

Market.—See *Sale*.

Marriage.—B. and S., Portuguese subjects and first cousins, went through the form of marriage

in 1864 in London, in accordance with the requirements of English law. Subsequently they both returned to Portugal, and have never lived together. By the law of Portugal, marriages between first cousins are null and void; but the Pope may grant a special dispensation which legalizes such marriage. *Held*, reversing the decision of Sir R. PHILLIMORE, that a petition for nullity of the marriage ought to be granted.—*Sottomayor v. De Barros*, 3 P. D. 1; s. c. 2 P. D. 81.

Married Woman.—See *Anticipation*.

Master and Servant.—See *Shipping and Admiralty*.

Misrepresentation.—See *Vendor and Purchaser*.

Mortgage.—A company with power to issue "debenture bonds" and "mortgage bonds," having an office in London and owning land in Florence, issued "obligations" binding themselves, their successors, and all their estate and property, to pay the bearer the sum stated on their face, with interest, in eight years; but reserving the right to call in a certain number of them each year by lot. The company afterwards duly mortgaged its property in Florence, in the Italian form, to a London bank, with notice of the issue of the "obligations." On breach of this mortgage, the mortgagees began proceedings at Florence, and got an order to sell. The plaintiff, holder of some of the "obligations," applied for an injunction to restrain the sale. *Held*, that it was contrary to comity for the court to interfere while proceedings were going on in Florence; also that the "obligations" were not mortgages, but only bonds, and constituted no claim on the land in Florence as against the mortgagee.—*Norton v. Florence Land & Public Works Co.*, 7 Ch. D. 332.

See *Attorney and Client*, 2.

Mortmain.—A testator bequeathed the sum of £3,000 to the corporation of T., directing £1,000 to be laid out "in the erection of a dispensary building, which is so urgently needed there," and the remaining £2,000 to be held "as an endowment fund for the said dispensary." The corporation already held lands in mortmain, upon which it could legally build a dispensary. *Held*, that the bequest was void under 9 Geo. II., c. 36, as not expressly prohibiting the purchase of land for the dispensary.—*In re Cox*. *Cox v. Davie*, 7 Ch. 204.

Negligence.—Respondent was a third-class passenger on appellant's underground railway, and at the G. station three persons got in and stood up, the seats in the compartment being already full. The respondent objected to their getting in; but there was no evidence that appellant's servants were aware of it, and there was evidence to show that there was no guard or porter present at the G. station. At the next station the door was opened and shut, but there was no evidence by whom. Just as the train was starting, there was a rush by persons trying to get in; the door was thrown open; the respondent partly rose to keep the people out; the train started, and he was pitched forward, and caught with his hand by the door-hinges to save himself; a porter pushed the people away just as the train was entering the tunnel, and slammed the door to, and thereby respondent's thumb was caught and injured. *Held*, reversing the decision of the Common Pleas and of the Court of Appeal, that there was no evidence that the injury was occasioned by the negligence of the appellant sufficient to go to the jury. It is a question of law for the court to say whether there is any evidence of negligence occasioning the injury to go to the jury. It is a question of fact for the jury to say what weight shall be given to the evidence-submitted to them. *Brydges v. The North London Railway Co.* (L. R. 7 H. L. 213) construed.—*The Metropolitan Railway Co. v. Jackson*, 3 App. Cas. 193; s. c. L. R. 10 C. P. 49; 2 C. P. D. 125.

See *Shipping and Admiralty*.

Notice.—See *Bills and Notes*, 4; *Covenant*, 3, 4. **Nullity.**—See *Marriage*.

Pannage.—Is a grant to the owner of pigs to go of right into the wood of the grantor, and allow his pigs to eat the acorns and beechmast which fall upon the ground. It does not entitle the owner of the right to have the grantor enjoined from cutting down the trees, or, *a fortiori*, from lopping the branches to improve the trees. This is the first pannage case to be found in the books.—*Chilton v. Corporation of London*, 7 Ch. D. 562.

Parol Evidence.—See *Will*, 1.

Partnership.—Partnership articles were entered into by M. and S., reciting that, under section 1 of Bovill's Act, (28 & 29 Vict. c. 86), D. had agreed to lend them £10,000, to be in-

vested in the business, subject to the following provisions, *inter alia*, agreed to by all the parties: The capital of the firm is to consist of said £10,000, and such other sums as shall be advanced by any of the parties,—all to bear interest at 5 per cent.; said £10,000 is advanced as a loan by D. under said section of Bovill's Act, and does not, and shall not, render D. a partner; M. or S. only shall sign the firm name; D. shall receive an account current at the end of each year, and be at liberty to examine the books at any time; an inventory shall be taken yearly, and the net profit or loss divided, in the proportion of 25 per cent. to D., and 37½ per cent. each to M. and S. In case of the death of M. or S., the business may continue, and the share of profits of the deceased partner shall be divided *pro rata* between D. and the other; D. may dissolve the partnership in case his original capital of £10,000 be reduced more than one half by losses, or on the death of a partner, and D. may demand for himself a liquidation of the business. On the death of D., his representatives shall not withdraw any of his capital until the termination of the present contract; D. may substitute any other person into his rights; and M. and S. have the same option with D., "by reimbursing him his capital and interest." Under this agreement, D. advanced at different times about £8,000 more. On the bankruptcy of the firm, *held*, that D. was a partner, and could not prove as a general creditor.—*Ex parte Delhasse. In re Megevand*, 7 Ch. D. 511.

Patent.—Three referees were appointed, under an act of parliament, to inquire into the impurities of the London gas, with the right to require the gas companies to afford them facilities for their investigations. As a result of their examination, the plaintiff, one of the referees, thought he had discovered a method of securing greater purity in the gas. The requisite change in the process of manufacture was suggested to the defendant company by the referees, and the company tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was withheld from publication for a few days, in order to enable the plaintiff to get out a patent for his discovery. *Held*, that when the knowledge acquired by the plaintiff in the course of his investigation was communicated to the other

members of the official board, it became public property at once, and the other members of the board had no power to consider the information confidential.—*Patterson v. The Gas Light & Coke Co.*, 3 App. Cas. 239; s. c. 2 Ch. D. 812.

Perpetuity.—Bequest of two hundred and forty shares railway stock, and four-sevenths of the residue of testatrix' property to trustees, in trust to accumulate the income until twelve months after the death of B., and then for such of B.'s four children as should be living at the expiration of said twelve months, "and the issue then living, and who shall attain the age of twenty-one years or marry, of any of the said children who shall have died," absolutely. *Held*, that the bequests were void, as contrary to the rule against perpetuities. The gift was to a class the members of which might not be ascertained within twenty-one years from the death of B.—*Bentinck v. Duke of Portland*, 7 Ch. D. 693.

Pleading and Practice.—See *Negligence*.

Power.—Power given to trustees under a will to appoint to the husband of testator's daughter, in case she should marry with their approbation, the income of the daughter's property after her death, during his life, or such part as the trustees should think proper. The daughter married before the testator's death, and with his consent. The trustees had, at the daughter's death, made no formal approval of the marriage, and made no appointment. *Held*, that the husband was entitled to a life-interest in the property.—*Tweedale v. Tweedale*, 7 Ch. 633.

Principal and Agent.—It was the custom of the defendant, through his agent S., in the usual course of business, to make certain advances on goods shipped by third parties, and to draw on the plaintiff for the amount so advanced. In the course of business, S., as agent, rendered a final account to the plaintiff, and in it charged plaintiff with certain advances, which it turned out afterwards had never been made. He then drew on the plaintiff for the amount, received the money, and appropriated the amount falsely charged to his own use. *Held*, that the plaintiff could recover the amount from the defendant.—*Swire et al. v. Francis*, 3 App. Cas. 106.

See *Factor*.

Profits and Losses.—See *Partnership*.

Promissory Note.—See *Bills and Notes*, 2, 4.

Protest.—See *Bills and Notes*, 5.

Publication.—See *Patent*.

Railway.—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, § 2), railway companies are forbidden to "give any undue or unreasonable preference or advantage to or in favor of any particular person or company," in the matter of carrying and forwarding freight. Plaintiff had a brewery at B., where there were three other breweries. The latter were connected with the M. Railway; plaintiff's was not. In order to get some of the freight from the three breweries away from the M. railway, the defendant railway carried their goods from the breweries to their freight depot free of charge, and still made a profit on the whole transportation. They made a charge to the plaintiff for the same service. *Held*, that this was an "undue preference" within the act, and the plaintiff could recover an amount equal to the cost of carting his goods to defendant's depot.—*Evershed v. The Northwestern Railway Co.*, 3 Q. B. D., 134; s. c. 2 Q. B. D. 254.

See *Negligence*.

Ratification.—See *Company*, 3.

Sale.—A man brought into market pigs from his infected herd, out of which many had died, and had them sold, stating that they were to be taken with all faults. *Held*, that he was not liable in damages to the buyer on whose hands the pigs died.—*Ward v. Hobbs*, 3 Q. B. D. 150; s. c. 2 Q. B. D. 331.

See *Vendor and Purchaser*.—*Vendor's Lien*.

Seaworthiness.—See *Bill of Lading*.

Shipping and Admiralty.—L. duly registered as "managing owner" of a sloop, traded with her for some time, employing E. as captain, and paying him regular wages. A verbal agreement was then made between them, that E. should take the ship where he chose, engage the men, and render accounts from time to time to L.; and L. was to have one third of the net profits. While this agreement was in force, and while the sloop was discharging a cargo under a charter-party, expressed to be between the charterers and E., "master, for and on behalf of the owners" of the sloop, she, through the negligence of E., caused damage to the plaintiff's ship. *Held*, that L. was responsible as well as E., for the negligence of E.—*Steel v. Lester & Lisle*, 3 C. P. D. 121.

See *Bill of Lading*; *Demurrage*.

Solicitor.—See *Attorney and Client*.

Specific Performance.—1. Defendant agreed to purchase the lease of a house, "subject to the approval of the title by his solicitor. *Held*, that disapproval of the title, on reasonable grounds and in good faith, by the purchaser's solicitor, released the purchaser from the obligation to specific performance. The stipulation is different from that implied in a usual contract to purchase, that the vendor shall make a good title.—*Hudson v. Buck*, 7 Ch. D. 683.

2. Plaintiff made a tender for the lease of a farm at £500 rental, mentioning the farm by name, and two different lots, which he meant to include in it, which amounted in all to about 250 acres. Defendant's agent did not look to see what lots were specified in the plaintiff's offer, but took it for granted that they were the same as those specified in another offer from one A., which he had just before opened, that being an offer for said farm, excluding one of said lots, and thus containing about 235 acres. The agent also said that he intended to let the said farm as containing 214 acres only, that being the quantity it contained, excluding the two additional lots; and he offered to grant a lease of 214 acres at £500 rent, the other two lots having been already let to other parties. *Held*, that a lease for 214 acres should be granted at a rent reduced from £500, in the proportion of 214 to 235.—*McKenzie v. Heskeith*, 7 Ch. D. 675.

Trust.—1. A testatrix left her property to her sister, and attached to it a precatory trust that the latter should leave it to K's "children, John, Sophia and Mary Ann." *Held*, that, in executing the trust, the sister could limit the shares of the daughters to their separate use.—*Willis v. Kymer*, 7 Ch. D. 181.

2. A sale and adjustment of a testator's property was made by trustees, under a decree of court, and years afterwards, some of the residuary legatees, being minors, brought a bill by their next friend to have the sale set aside, on the ground that the adjustment was improper and brought about by the fraud of one of the trustees. The bill was dismissed on its merits. *Held*, that as the minors' next friend could not respond in costs, the trustee charged with fraud, who appeared and defended, was entitled to costs out of the estate, as he had defended that, as well as his own character.—*Walters v. Woodbridge*, 7 Ch. D. 504.

3. Two trustees advanced money to A., a builder, on security of land purchased by A., of B., the defendant and one of the trustees, and which A. had built upon. The money was used partly to pay for the land, and partly to repay other sums which A. owed B. The plaintiff, the other trustee, knew that A. and B. had had business relations. A. went into bankruptcy; and the plaintiff filed a bill against B., his co-trustee, alleging that the security was insufficient, and asking that the property be sold, and that the defendant be held to make up the deficiency.—*Refused.*—*Butler v. Butler*, 7 Ch. D. 116; s. c. 5 Ch. 554.

Vendor and Purchaser.—The plaintiff purchased a piece of property, had the title examined by his solicitor, was advised that it was good, and completed the purchase. He subsequently discovered that certain parties were entitled to the flow of water through an underground culvert, the existence of which he was not informed of, and had not discovered in examining the title. *Held*, that, after the execution of the conveyance and completion of the purchase, he could not obtain compensation for such defect.—*Manson v. Thacker*, 7 Ch. D. 820.

See *Composition; Covenant*, 5; *Specific Performance*, 1.

Vendor's Lien.—The respondents purchased of the appellants at various times between Feb. 13 and June 1, 1876, parcels of tea imported by the latter, and lying in a bonded warehouse kept by them. At each transaction, a warehouse warrant, indorsed in blank, was given the indorsers by the appellants, stating that the tea had been warehoused by the appellants Jan. 1, 1876. Subsequently the appellants added to the blank indorsements the name of the respondents, thus making the goods deliverable to the respondents' order alone. Warehouse rent was charged by the appellants from Jan. 1, 1876, to the delivery of each lot, and paid by the respondents. The latter having become bankrupt before their notes given for the tea were paid, the appellants claimed a vendor's lien on the tea sold to the respondents and remaining in their warehouse. *Held*, that there had been no delivery, and the lien was good.—*Grice v. Richardson*, 3 App. Cas. 319.

Warehouseman.—See *Vendor's Lien*.

Warranty.—See *Bill of Lading*.

Will.—1. A testator left £800 to the children

of his daughter by any other husband than "Mr. Thomas Fisher, of Bridge street, Bath." At the date of the will there was a Thomas Fisher living in Bridge street, Bath, who was married and had a son, Henry Tom Fisher, who sometimes lived with his father, and who had paid his addresses to the daughter, and after the testator's death, married her. On the question whether their child was entitled to the £600, *held*, that evidence of the above facts was admissible to show who was meant by the testator.—*In re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

2. C., by will, gave £12,000 in trust for his four daughters; as to £3,000 thereof to his daughter S. for life, and at her death to her children then living. If she left no child, the income was to be paid to the other daughters then living, and to the survivor or survivors; and, after the decease of the last surviving daughter, the £3,000 to the child or children of such last surviving daughter, and, if there were no such children, the same was to "be paid to such persons as will then be entitled to receive the same as my next of kin," under the statute of Distributions. A similar provision was made as to the share of each of the other daughters. S. died leaving issue. The other three daughters subsequently died without issue. On the application of the personal representative of the last survivor, *held*, reversing the decision of Bacon, V. C., that the time to ascertain the class of next of kin was the death of the testator, not the death of the last surviving daughter.—*Mortimer v. Slater*, 7 Ch. D. 322.

3. A testator recited that his son had become indebted to himself in various amounts, describing them, and bequeathed to the son said amounts, and released him from payment thereof, and of "all other moneys due from him to" the testator. By a codicil, he released to the son another sum, which the son had misappropriated after the date of the will. At the testator's death the son was indebted to him in other sums, incurred after the date of the codicil. *Held*, reversing the decision of MALINS, V. C., that the will must speak from the testator's death, and the release applied to all debts incurred before that time.—*Everett v. Everett*, 7 Ch. D. 428; s. c. 6 Ch. D. 122.

4. Testator left his property in trust for his children, the shares of the sons to be paid them at the age of twenty-five, those of the daughters to be settled to their separate use for life, remainder in trust for their issue. Then followed this clause: "And in case of the death of my said daughters or of any of my sons before they shall attain their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in my estate, for the reasons aforesaid, without lawful issue, or having such, and they shall happen to die, being a son or sons, before he or they shall have attained the age of twenty-five years, or being a daughter or daughters, before the age of twenty-one years or marriage, then and in such case I do hereby will and direct that the share or shares of him, her or them so dying, shall go and be divided equally between my surviving children, and be paid to them or applied to their uses in such manner as his or their original shares are hereby directed to be paid and applied, . . . according to the true intent and meaning of my will." The testator left three sons who attained the age of twenty-five, and three daughters, who all married and attained to the age of twenty-five. Two daughters died leaving issue still living. One son died unmarried, and one leaving issue still living; then the third daughter died without issue, and finally the third brother died. On a petition for the payment of the share of the third daughter to the persons entitled, *held*, reversing the decision of the Master of the Rolls, that "surviving children" meant "other children," and that the share in question was to be divided into fifths, and paid, one-fifth each, to the issue or personal representatives of the two sisters and three brothers of the deceased.—*Lucena v. Lucena*, 7 Ch. D. 255.

5. A testator directed his trustees to hold a fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of the daughter or daughters at that age or marriage." *Held*, that these interests were at the testator's death vested, though subject to be divested in certain events.—*Armstrong v. Wilkinson*, 3 App. Cas. 355.

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SAUVE v. SAUVE.

Two judgments have been communicated to us,—one rendered some years ago, in the case of *Berthelot v. Theoret*, and the other a recent decision by Mr. Justice Sicotte in the case of *Sauvé v. Sauvé*. The suggestion is that these decisions are in conflict, one holding that the *cédant* has no right of action, and the other that the *cédant*, and only he, may sue. It must be conceded, however, that there is a very material difference between the two cases. In the recent case an heir had ceded his rights of succession, but this transfer had never been signified upon those sued, and by a private writing the transfer had been cancelled before the suit was brought. The debtor, therefore, had no interest in invoking the transfer. As far as he was concerned it was as though it had never been. In the case of *Berthelot v. Theoret*, the plaintiff sued for the balance of the price of sale, after such balance had been transferred to another party, and the debtor had accepted notice of such transfer. In the latter case the action was dismissed, and it seems to us rightly.

RIGHTS OF RAILWAY COMPANIES.

A decision recently given in England by Vice-Chancellor Malins in the case of *Norton v. The North Western Railroad Company*, is interesting as laying down the principle that railway companies do not possess precisely the same rights over their land as other proprietors. The plaintiff in the case was the proprietor of a hotel erected on land adjoining the land of the company, and there were windows overlooking the company's land, which had been used for several years without interruption. In 1874 the company erected a signal cabin, with a chimney, immediately under the windows, and the plaintiff complained that the smoke entered his hotel by the windows over the chimney. The company, when the smoke was complained of, in the first place demanded a quit rent from the plaintiff in consideration of his windows overlooking the railway, and when that was refused,

commenced to erect on their land a high, close board fence about two feet from the hotel windows. The action was for an injunction against the erection of the fence. The pretension of the company was that the fence was to prevent the plaintiff from acquiring by user an easement which would interfere with the erection of buildings that might be required thereafter for the company's business. The injunction, however, was granted, the Vice-Chancellor remarking that a railway company had not all the rights of an owner in fee simple, and that the owner of land adjoining the lands of a railway had the same rights as if the railway had not been constructed. He had a right to have windows overlooking the railway, so long as he did not interfere with the working of the line.

DECOY LETTERS.

A case of some interest was decided recently by the United States Circuit Court in Missouri. One McAfee, acting as agent for the Society for the Detection of Vice, deposited in the post-office at St. Louis, with the concurrence of the authorities, a letter in these terms:—

"BUTLER, GA., NOV. 14, 1877.

"DR. WHITTIER,—Can you furnish me an absolutely sure way to prevent conception? What will it cost? How can I get it? What is the price of your 'Marriage Guide'? Address MISS NETTIE G. HARLAN,

"Butler, Georgia."

The letter was post-marked on the outside as coming from Georgia, and was delivered to Whittier by the mail-carrier in the usual course. In reply, Whittier wrote and deposited in the post-office at St. Louis the following:—

"MISS NETTIE G. HARLAN, Butler, Ga.—I have what you desire. It is perfectly safe, sure and healthful, and can be easily used. The price is \$10, sent by express only on receipt of price. Price of Marriage Guide is 50 cents. Respectfully,

"C. WHITTIER, M.D."

The letter was directed to Miss Nettie G. Harlan, Butler, Ga., but it was handed by the post-office authorities to McAfee, and on these facts an indictment was found against Whittier under an Act of Congress enacting (amongst other things) that those sending through the mails "Every obscene, lewd, or lascivious book, &c., and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of

kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, &c., shall be guilty of a misdemeanor," &c. The question submitted to the court was whether the indictment could be sustained, and it has answered it in the negative. The judges, however, did not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws; on the contrary, it recognized the doctrine that such letters may be so used. But it quashed the indictment on the ground that the letter written by Whittier did not give the prohibited information, and hence was not within the statute. The point is a very narrow one, for evidently, if the letter of inquiry had been a genuine one, the reply, stating how the article could be procured, would have brought the case within the statute. Decoy letters are, in truth, not to be commended, nor to be lightly resorted to; but if their use is ever justifiable, it should be for the detection of such an offence as this, the evidence of which is so hard to be procured by other means. "Many frauds upon the postal, revenue and other laws," remarked Judge Dillon, "are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called decoy letters—that is letters prepared and mailed on purpose to detect the offender, and it is no objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters specially prepared and mailed by the officers of the government, and addressed to a person who had no actual existence. The books contain many cases where such convictions have been sustained": *Reg. v. Rathbone*, 2 Moody's C. C. 310; *Reg. v. Gardner*, 1 Carr. & Kirwan, 628, &c.

"There is a class of cases," continued the judge, "in respect of larceny and robbery, in which it is held that, where one person procures, or originally induces the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent or against the will of the owner. Archbold's Crim. Pr. & Ev. 364; *Rex v. Eggington*, 2 Bos. & P. 58; *State v. Covington*, 2 Bailey (S. C.), 569; *Dodge v. Brittain*, Meigs (Tenn.)

84, 86; *Alexander v. State*, 12 Tex. 540; 3 Chitty's Crim. Law, 925; 2 East's P. C. 665; 1 Bish. Crim. Law (5th ed.), §§ 262, 263.

"The reason is obvious, viz; The taking in such cases is not against the will of the owner, which is the very essence of the offence, and hence no offence, in the eye of the law, has been committed.

"The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting. This is strikingly shown by *Rex v. McDaniel*, Foster, 121; S. C. 2 East's P. C. 665, where 'Salmon, McDaniel and others conspired to procure two persons, ignorant of the design, to rob Salmon on the highway, in order that they might obtain the reward at that time given for prosecuting offenders for highway robbery. Salmon, accordingly, went to a particular place fixed upon, with some money, and the two men who were procured, being led there by one of the conspirators, robbed him, and they were afterward prosecuted and convicted, but the conspiracy being afterward detected, the conspirators were indicted as accessories before the fact to the robbery, and, the facts being found by a special verdict, the case was argued before all the judges, who held that the taking of Salmon's money was not a larceny, being done not only with his consent, but by his procurement.' But this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act. 1 Bish. Crim. Law (5th ed.), § 262. Thus, where a prosecution was founded on an act of the Legislature, imposing a penalty on any one who should deal or traffic with a slave without a written ticket or permit from the owner, it is held that the offence is consummated, although the trading was done by the slave in pursuance of instructions of the owner, and in his presence, when the accused was ignorant of such instructions and presence. The reason is, that, 'like *Eggington's case*, *supra*, this is a contrivance to detect the offender.' *State v. Covington*, 2 Bailey (S. C.), 569, 573; see, also, *Regina v. Williams*, 1 Carr. & K. 195; *Regina v. Gardner*, id. 628."

—There are now 149 barristers and 5 solicitors in the House of Commons.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT (IN REVIEW).

MONTREAL, May 31, 1875.

MONDELET, BERTHELOT AND TORRANCE, JJ.

BERTHOLET V. THORET.

Right of Action—Transfer.

A *cédant*, although his transfer has not been served on the debtor, has no action, the *cessionnaire* only having the right to sue and recover the amount of the transfer.

This was a review of a judgment rendered by the Superior Court, Montreal, on the 31st March, 1875. In the Court below, JOHNSON, J., gave judgment as follows:—

On the 8th of April, 1864, Etienne Prevost purchased from the plaintiff a lot of land at St. Louis de Gonzague, and the purchaser's father, Narcisse Prevost, became a party to the deed of sale, and hypothecated his property at Ste. Genevieve for the payment of the price, and subsequently, on the 5th of October, 1864, he sold to the defendant the property he had so hypothecated. The plaintiff now brings her action against the defendant, with hypothecary conclusions as to the payments that are due under the deed of sale, and *en interruption de prescription* as to those that are to become due. The defendant pleads that on the 7th November, 1867, the plaintiff transferred to Narcisse Papineau the balance of the price due and to become due under the deed of sale, and the debtor, Etienne Prevost, subsequently, on the 3rd of December, 1867, acknowledged and accepted the transfer, and that, therefore, Papineau, the *cessionnaire*, is proprietor of the debt, and he alone could sue either the purchaser or the surety. This plea was demurred to by a special answer, on the grounds that the defendant was not setting up his own right, but the right of another, and that the assignment of the debt, the registration, and the acceptance by the debtor only gave a right to the *cessionnaire* against the principal debtor, but none against the defendant. It is further set up in another special answer that the assignment to Papineau had been made with promise of warranty by the plaintiff, and that she was therefore interested in seeing the debt paid. These questions were reserved by consent, and the case has been heard on the merits. Therefore the law and the merits are before me. The defendant here

is not the debtor. He is only surety for the debt. He can liberate himself by giving up the property. When the plaintiff has once assigned her debt, she has also assigned the accessories. [See Art. 1574, C.C.] It is nowhere pretended in this case that the real plaintiff is the *cessionnaire*, and it could not be so unless the *transport* had assigned all the *droits, noms, raisons, et actions* of the *cédant*, which it does not do. Therefore the *cédant* is here insisting on her own right to maintain the action; but in her declaration she says nothing about the transfer to Papineau, or of her promise of warranty (*garantir, fournir, et faire valoir*), and the special answer cannot change the ground of action, which should have been disclosed in the declaration in order that the defendant might plead to it. She might probably have had an action, if there was such promise of warranty on her part, to the extent at least of preserving the *hypotheque* in the event of her being called on to make good her promise. But we first hear from the defendant in his plea of this transfer that the plaintiff has made of her rights; and in the special answer it is too late to rectify the omission in her declaration of the only ground of action, and that, too, in a modified form, that she could have had against the defendant. I am therefore of opinion to dismiss the plaintiff's action, with costs.

The Court of Review unanimously confirmed the above judgment.

Doutre & Co. for plaintiff.

Mousseau & Co. for defendant.

SUPERIOR COURT.

MONTREAL, July 8, 1878.

SICOTTE, J.

SAUVÉ V. SAUVÉ et al.

Right of Action—Vendor—Non Signification.

Although an heir has sold all his rights in the succession of his father to a third party, and has caused the deed of sale to be duly registered, but the transfer has not been signified, he must sue afterwards in his own name in the interest of the third party who has acquired such rights, such third party having no action in his own name.

SICOTTE, J. The plaintiff claims the succession of his father from the defendants, his co-heirs and legatees, who are in possession. It is the *petition d'héritif*. The defendants pretend that the plaintiff cannot make this demand because

he has made a transfer of his rights of succession. The plaintiff answers that it is true he has made a cession, but the transfer has not been signified, and the defendants cannot avail themselves of this ground; that, besides, the transfer had been resiliated and annulled previous to the action, and he produces a paper *sous seing privé* showing the resiliation. The defendants have made no proof against this document, and there can be no reason for not giving it force. The defendants do not contest the ownership of the succession claimed, nor the defendant's quality of heir. They must give back the succession and render an account, as prayed.

Independently of this resiliation, the action as instituted would be well brought. See Pothier, *Droit de Propriété*, Nos. 369, 393.

Notwithstanding the sale of his rights of succession, the vendor always continues heir and third parties are entitled to consider him such. See Troplong, vol. 2, No. 979.

In the present case there has been no signification of the cession, and it is without effect as regards third parties. Troplong, Nos. 884, 885, 886. Pothier, *Vente*, Nos. 550, 554.

The judgment in *Berthelot v. Theoret*, invoked by the defendant, is not applicable. In that case there was signification of the cession. Everything was different, the cause of action and the condition of the parties.

The judgment is as follows:—

The Court, &c.

Considering that the plaintiff has proved the allegations of his action; that he was entitled to claim the succession devolving to him from his father, and of which the defendants are in possession;

Considering that the defendants are not well founded in the exception which they invoke, by reason of the transfer which they allege has been made of this succession by the plaintiff, inasmuch as it is proved that the cession had been annulled before the institution of the action, and as such cession, even if not resiliated, so long as it was not signified, could not entitle the defendants to oppose it to the *cédant*;

Considering, &c., &c. Judgment for plaintiff.

St. Pierre & Co. for plaintiff.

Doutre & Co. for defendant.

A GREAT CHANCELLOR.

The great chancellors are few in number. They appear but once in a generation. Those of our own country may be counted upon the fingers of one hand; while the mother country, except for the longer duration of her judicial history, has been scarcely more prolific. It is the purpose of this paper to sketch in outline the career of one of the few; one who received the great seals solely as the reward of judicial merit, who held them for a longer period than any of his predecessors, and who was, in his generation, the foremost figure in English jurisprudence.

John Scott, the future Lord Eldon, was born at Newcastle on June 4, 1751, the day being otherwise memorable only as the birthday of George III., the sovereign whom he afterwards served so well. His father was a coal-fitter, of decent station in life, and of sufficient means to afford his sons John and William, who was afterwards the celebrated admiralty judge, Lord Stowell, good educational advantages. Scott's early education was had at the Free Grammar School in Newcastle, and on May 15th, 1776, when scarcely fifteen years of age, he matriculated at University College, Oxford. His college life was uneventful, and on February 20, 1770, he received his Bachelor's degree. He continued in residence at the university, and successfully competed for the chancellor's prize for the best composition in English prose, his subject being: "The Advantages and Disadvantages of foreign Travel."

He was intended, originally, for the Church, but the change in his circumstances brought about by his marriage forced him to abandon his original plans. Soon after receiving his degree he became acquainted with a Miss Surtees, the daughter of a banker at Newcastle, and after a year's engagement, their union being opposed by the parents of both, they were compelled to resort to a runaway match, with the usual accompaniments of ladder and post-chaise. Leaving Newcastle, they drove all night; and reached next morning the village of Blackshields, near Edinburgh, where they were married, November 19, 1772. The Scotts soon relented toward the young couple, and they were invited to take up their residence under the paternal roof. The Surtees family withheld their blessing upon the runaway match for a longer period, but

finally accepted the situation, and joined in making a modest settlement upon the young people. While no doubts were entertained of the validity of the clandestine marriage, yet, with a view of better preserving the evidence of their union, it was thought desirable to again perform the ceremony in England, which was accordingly done at Newcastle, January 19, 1773. The marriage proved an exceedingly happy one, and throughout his long and eventful career Scott showed the warmest devotion to the Bessy of his earlier days. When he afterward held the great seal under George III., the king boasted that he had what no previous king of England could boast—an archbishop of Canterbury, Dr. Sutton, and a lord chancellor, both of whom had run away with their wives. But the chancellor seems to have had little sympathy for runaway matches other than his own, and when his eldest daughter eloped with the youth of her choice, but not her father's, three years passed before he became reconciled to the young couple.

His marriage having rendered the clerical profession impracticable with the slender means at his command, young Scott immediately turned his attention to the law—rather from the necessity of earning a livelihood than from any previous inclination. Repairing to London, he was entered as a student at the Middle Temple, January 28, 1773, and with his wife he then took up his residence at Oxford, while reading for the bar and keeping his terms in London. Sir Robert Chambers, the Vinerian professor of law, having just been appointed to a colonial judgeship, Scott was selected as his deputy to read his lectures during his absence, receiving for these services a salary of £80 per annum. His introduction to his new field of labor was described in his own words, as follows: "The law professor sent me the first lecture, which I had to read immediately to the students, and which I began without knowing a single word that was in it. It was upon the statute 'Of young Men running away with Maidens.' Fancy me reading, with about 140 boys and young men giggling at the professor. Such a tittering audience no one ever had."

On February 13, 1773, Scott took his Master's degree, and immediately applied himself to the study of the law with great earnestness.

Few men have studied their profession more diligently. He rose at four o'clock in the morning, took little exercise, lived abstemiously, studied until a late hour of the night, and seriously endangered his health by his close application to his legal studies. In the long vacation of 1775 he bade farewell to Oxford and, with his wife and infant child, took up his residence in London. His intention, at this time, being to fit himself for conveyancing, and to settle as a conveyancer in his native town, he was so fortunate as to obtain admission to the chambers of a Mr. Duane, one of the most eminent conveyancers of that time, who kindly waived the usual fee of 100 guineas. During his six months in the chambers of Mr. Duane he labored incessantly, copying all the manuscript forms to which he had access, making an immense collection of precedents, and examining all the drafts of conveyances which passed through the office. And to this period of his study he afterwards ascribed much of his professional success.

On February 9, 1776, Scott was called to the bar by the Honorable Society of the Middle Temple, and in the Easter term following he presented himself as a candidate for practice. He chose the Northern Circuit, and for the first year seems to have had but little business. He used to relate that he was cheated out of his first fee, and that his entire professional gains for the first twelve months after donning the gown amounted to but 9s. In his second year he seems to have been more fortunate, being frequently retained by the attorneys of Newcastle, and achieving considerable success in defending criminals.

At this period he determined to carry out his original plan of settling as a provincial counsel as Newcastle, and actually hired a house with this end in view. Fortunately for his subsequent career he changed his plans and decided to remain in London, possibly owing to the promise, by Lord Thurlow, of the office of a commissioner of bankruptcy; a promise which that chancellor never fulfilled.

At about this period, also, he began to abandon the common law courts and took himself to the Court of Chancery, though still continuing to travel the circuit. His reasons for the change, as stated in his own words, were the following: "The Court of Chancery was

not my object when first called to the bar. I first took my seat in the King's Bench; but I soon perceived, or thought I perceived, a preference in Lord Mansfield for young lawyers who had been bred at Westminster School and Christ Church, and as I had belonged neither to Westminster School nor Christ Church, I thought I should not have a fair chance with my fellows, and, therefore, I crossed over to the other side of the hall."

At this time the Court of Chancery was scarcely regarded as a public forum, its proceedings being rarely noticed in the newspapers; and an equity barrister was not ranked of very high standing in the profession. The number of counsel then practising at the equity bar did not exceed twelve or fifteen. These were accustomed to sneer at Scott's presumption in aspiring to success in this branch of the profession, since he had never been bred to the chancery practice, and they could not understand how a lawyer who had never drawn a bill or answer, or served an apprenticeship in an equity draughtsman's office, could hope to be a successful equity barrister; and for a time his prospects were far from bright. His brother William, writing to his brother Henry, in January, 1779, says: Business is very dull with poor Jack, very dull indeed; and of consequence he is not very lively."

But, despite the sneers of the chancery bar, "poor Jack" applied himself diligently to studying the doctrines and procedure of the court of equity, and in his first cause of importance, the celebrated case of *Ackroyd v. Smithson*, 1 Bro. C. C. 503, he won his spurs. The case has always been cited as a leading authority upon the doctrine of conversion, and it is not too much to assert that the argument of young Scott established the doctrine of the English courts upon the questions involved. The testator had by his will directed all his real and personal estate to be sold, and, after the payment of several specific legacies, directed that the residue should be divided in certain proportions among fifteen legatees. Two of these residuary legatees died during the lifetime of the testator. Upon his death a bill was filed by his next of kin against the surviving legatees and the heir at law, claiming to be entitled to the interest of the two deceased legatees as lapsed, and, therefore, as part of the

personal estate to which the next of kin was entitled. Lord Sewell, master of the rolls, held that the surviving legatees took the whole in proportion to their respective legacies, and dismissed the bill, when an appeal was had to Lord Thurlow.

Scott appeared for the heir at law, and, in an argument of singular force and brilliancy, contended that the death of the two legatees had not been contemplated by the testator, and that he had not intended that the lapsed legacies should go either to the next of kin or to the surviving legatees; and, therefore, they should still be treated as realty, as to that portion derived from the realty, and, hence, should go to the heir at law. Lord Thurlow decreed accordingly, and the case has ever since been ranked as a *cause célèbre*. The argument of the young barrister, even as imperfectly reported in Brown, is an admirable example of the closest and severest legal logic.

Ackroyd v. Smithson is also remarkable as being one of two instances where future chancellors achieved sudden prominence in the profession by a single argument at the bar; the other instance being the maiden effort of Erskine, who, from a midshipman in the navy and a lieutenant in a regiment of the line, sprang into sudden and successful practice as the result of his wonderful speech in the case of *Captain Baillie*.

From this time onward Scott's success was assured, and his practice steadily increased. In 1783, when but seven years at the bar, he received the honor of a patent of precedence, and donning his silk gown he took his seat within the bar, his promotion occurring at the same time with that of Erskine. This distinguished honor—which the American bar, utterly wanting in any system of promotion or recognition of merit other than by elevation to the bench, can hardly understand—seems to have been awarded without solicitation, and solely as a recognition of his merit. Though yet young in the profession, he was rapidly attaining the leadership at the bar, and was during this year called to a seat in Parliament for the borough of Weobly. His maiden speech in Parliament, like that of Erskine, was made upon Fox's India Bill, and, like Erskine's, it was regarded as an utter failure.

In 1787 Scott received his first judicial

appointment, being made chancellor of the County Palatine of Durham, one of the inferior equity courts of the kingdom—the judicial duties then pertaining to the office, however, being little more than nominal.

In 1788 he was appointed solicitor general, to the great delight of his old friends and townsmen at Newcastle, who had watched his course with the warmest interest. He modestly desired to avoid the honor of knighthood, but George III. then laid down the rule, which has ever since been followed, that the attorney general and solicitor general, as well as judges, if not already of noble birth, should be knighted upon their appointment. Scott accordingly submitted to the ceremony and became Sir John—writing an amusing letter to his brother Harry recounting the event and his wife's annoyance over her new title.

Although the etiquette of the profession had always required that the attorney or solicitor general should, upon his appointment, renounce his circuit, Scott took the unusual step of again going the Northern Circuit, but for the last time. The ensuing four years of his professional and official life were comparatively uneventful. There was but little public business, few State prosecutions demanded his attention, and the greater portion of his time was left to his practice in the Court of Chancery, which had now become very large and lucrative. His professional income during the four years that he held the office of solicitor general averaged about £10,000 yearly, and during the period of his attorney generalship, from 1793 to 1799, it was still larger, reaching as high as £11,000 and £12,000, a sum representing at least double the same amount at the present day.

On February 13, 1793, Scott was promoted to attorney general, and from this period may be dated his active public career. The times were perilous. The French Revolution was unsettling all Europe, and nowhere outside of France were its effects more apparent than in England. Seditious meetings were held in various parts of the kingdom, chimerical schemes of reform were published, and various organisations were perfected throughout the country having for their object a change in the existing state of government, including the abolition of the monarchy and privileged orders. Many of the leaders of these organi-

zations were indicted for high treason, and the State trials which occurred during the year 1794 have become memorable in the annals of the English bar. Among these were the celebrated cases of Thomas Hardy, Horne Tooke, and Thelwell, all of which were prosecuted by Scott as attorney general, Erskine leading for the defence in these as in most of the trials for high treason during that period. Erskine won the verdicts in the cases named, as he did in most of the State trials of that time. Indeed, it is no disparagement to Scott to say that he could not cope with Erskine as an advocate. The English bar has produced but one matchless advocate, supreme over all forensic orators ancient or modern, and that one was he whose early years were passed in the not over-refined society of a man-of-war, and in the barrack-room of a marching regiment.

But while Scott did not excel as an orator, during this or any portion of his career, either in his profession or in Parliament, his speeches were always clear, forcible, and in good taste, and he did his duty thoroughly, and in the main acceptably, as attorney general. The chief criticism upon his official course during this period has always been that he showed an undue severity in prosecuting offenders; and it must be conceded that there is much foundation for the charge. He certainly evinced an undue zeal in prosecuting for libels, and instituted many proceedings of this nature, in which he was more successful than in trials for high treason. On one occasion he boasted in Parliament that during the preceding two years of his administration there had been more prosecutions for libels than in any twenty years before. His career as attorney general terminated in 1799, and may be dismissed with the words of a contemporary: "For six years of active official and extra-official duty, during which he screwed the pressure of his power more tightly than any attorney general before or since, with the single exception of Sir Vicary Gibbs, he still retained a large share of personal good-will, and was the favorite alike of the bar, of suitors, and the public."

In July, 1799, he was promoted to the chief justiceship of the Common Pleas, and elevated to the peerage, taking the title of Baron Eldon, from an estate of that name which he had previously purchased in the county of Durham.

His record as a common law judge during the period of nearly two years that he sat in the Common Pleas was satisfactory alike to the bar and to the public, and during this period of his judicial career he seems to have been less prone to doubts and delays than was the case when he succeeded to the chancellorship. On September 24, 1799, he took his seat in the House of Lords, and it is not too much to assert that during the ensuing thirty years of English history, no man wielded a more marked and powerful influence in that body than Lord Eldon.

In April, 1801, the administration of Pitt came to an end, and to Mr. Addington, as the new prime minister, was assigned the task of constructing a cabinet. Lord Eldon was selected as chancellor, and on April 14th he received the great seal from the hands of George III. On the first day of the ensuing Easter term, in accordance with a time-honored custom, he headed a procession from his house to Westminster Hall, and was formally installed in the Court of Chancery, attended by all his colleagues of the new Cabinet, and by the entire profession of the law.

At the age of fifty years, with his faculties ripe and vigorous, he had attained, unaided by fortuitous accidents of birth or surroundings, and solely by force of his own merit, the highest judicial station among civilized nations; for if we consider the magnitude of the judicial functions proper which pertain to the office of lord high chancellor of England, with his onerous and varied duties and functions as a member of the Cabinet, and as presiding officer of the House of Lords, as well as the immense patronage, judicial and clerical, at his disposal, it must be conceded that the office surpasses in dignity and power all other judicial stations of modern times.

The appointment gave general satisfaction to the profession and to the public, and the new chancellor immediately addressed himself with vigor to the discharge of his onerous judicial duties. The period of his first chancellorship, lasting five years, was comparatively uneventful. The most serious criticism upon Eldon's administration of the office during this time was upon his conduct in the use of the king's name during his frequent periods of lability, especially during the years 1801 and

1804. It is undoubtedly true that the chancellor made use of the king's name in affixing the great seal to commissions and acts of Parliament when that monarch was in fact *non compos mentis*; and for this Lord Eldon was then, and for many years afterwards, both in and out of Parliament, severely censured by his political enemies. These animadversions caused the chancellor great unhappiness; and it was openly charged against him in Parliament that he had used the king's name when he was in such a condition of mental incapacity that a deed executed by him would have been held void by Lord Eldon sitting in his Court of Chancery. And yet it cannot be doubted that he acted from the purest motives, and that he was governed solely by a desire to promote the public good.

Pitt having succeeded Addington as a prime minister in 1804, Lord Eldon was retained as chancellor under the new administration. But the death of Pitt, in 1806, led to the formation of a new ministry, and the king sent for Lord Grenville to make up his Cabinet. Grenville insisted on taking in Fox as secretary of state and Erskine as lord chancellor, and the new Cabinet thus formed has passed into history as the Fox and Grenville Cabinet, or that of "All the Talents." Upon the completion of the new ministry, Eldon resigned the great seals to the king in person, February 7, 1806. But the new administration, though composed of "All the Talents," was destined to be short-lived, and lasted but little over a year. A new ministry followed, with the Duke of Portland at its head, and on April 1, 1807, the great seals were again placed in Eldon's willing hands, and he was warmly welcomed by the chancery bar on his return to the familiar court. Even the Whig lawyers, to whom he was opposed in politics, were delighted with his reappointment.

From the moment of his return to the Cabinet and the woolsack was again manifest what had been apparent throughout his former chancellorship—his marked ascendancy over the king's mental indisposition, to which allusion has already been made, and it was evidenced in many ways. In 1804 he caused the king to dismiss Addington from his Cabinet and to recall Pitt as prime minister. Again, upon the formation of the Fox ministry, in 1806, Eldon

narrates that when he tendered the seals in person to the king, upon his resignation, "the king appeared for a few moments to occupy himself with other things; looking up suddenly, he exclaimed, "Lay them down on the sofa, for I can not, and will not, take them from you." So, when Canning was scheming for the destruction of Portland's administration, in 1809, Eldon tendered to the old king his resignation. "For God's sake," said the unhappy monarch, "don't you run away from me; don't reduce me to the state in which you formerly left me. You are my sheet anchor."

Indeed, after his recall to the woolsack in 1807, although the Duke of Portland was nominally the prime minister, Eldon was in reality the head of the government, and so continued during almost that entire administration. The appellation of Keeper of the King's Conscience was, in his case at least, no unmeaning sound, and he exercised a larger power and influence in the Cabinet and upon the king in person than had been exercised by a chancellor for many years.

In 1811 the increasing mental infirmities of George III., and his utter incapacity for business, led to the enactment of the Regency Bill, and the Prince of Wales became regent, and practically king. He continued all his father's ministers in power, and Eldon continued to hold the great seals. During the nine years of the regency, although the administration was at times in great danger of disruption, yet, owing largely to the skill, boldness, and address of Eldon, it weathered every storm, and held together until the death of the king, in 1820, when all his ministers, including Eldon, tendered their resignations, but were all immediately reappointed by George IV.

[To be continued.]

"DEVILS" OF THE ENGLISH BAR.

Considering the antipathy which any experience of the law excites among suitors, it is wonderful what fascination it seems to exercise over some of its exponents, or rather over its would-be exponents. We refer to that numerous class of young barristers who pursue the avocation of "devils". To the uninitiated we will explain what is meant by a devil. The picture is not to the lay mind a very attractive

one, and yet there are a good many young gentlemen at the Bar who would give one of their ears to be in the shoes of a more fortunate friend who occupies the proud position of devil to a leading junior. In the first place a devil has no work of his own; if he had he could not properly exercise his demoniac functions. His duties consist in getting up masses of papers, and in holding the less interesting of the briefs of another barrister who has got more work than he can get through; in getting abused by the solicitor who does not approve of the work being done by a deputy, and who, if the case is lost, puts it down to the incapacity of the deputy aforesaid, and if it is won, never dreams of awarding any thanks, still less briefs to the winner. And the odd part of it all is that not one groat does the devil receive. He has to keep up chambers, a share of clerk, and himself, and to be constantly at the beck and call of his patron, for he knows if he is not, or if the work be carelessly done, there are seven, or, indeed, seventy others, worse or better than himself, as the case may be, ready to seize on the post with avidity. Another odd feature of the profession is, that the devil really enjoys his work until he gets tired of it. In no other profession that we know of is there presented the spectacle of one man doing another's work for nothing and really liking it. He is not always, to the non-legal mind, a very interesting person to meet in general society, for his conversation is apt to confine itself to recent cases, and the "points" taken or not taken therein, interspersed with choice legal anecdotes which are about as suitable at an ordinary dinner party as Mr. Bob Sawyer's illustration of the removal of a tumor from a gentleman's head, by means of a quatern loaf and an oyster knife, was at Dingley Dell. Of all shop—and shop of any kind is wearisome—legal shop falls the flattest on the ordinary diner-out.

The advantages which are gained, or are supposed to be gained by deviling are, firstly, that the young barrister gets experience, and what is of most importance, something to do during the weary years of waiting which tail off so many; secondly, that he is supposed to have opportunities for making friends of the Mammon of Unrighteousness in the shape of solicitors who, when the leading junior to whose skirts the devil clings, passes into the

smooth harbor of "silk," will bestow on him the briefs which they formerly showered on his patron. Too often the hope is a delusive one, and after having served so many years for the Rachel of practice, the legal Jacob sees her pass into the arms of a whiskerless stripling just out of his pupillage, who is the son or the nephew, or more often the son-in-law, of a solicitor. It is no new discovery that there is a block in all professions, and that in no profession is there anything like the block that there is at the Bar. It is no exaggeration to say that there is work for ten and a hundred to do it. No man without interest should in these days dream of going to the Bar unless he is possessed of exceptional abilities, and even then he must be sure that they are the right sort of abilities. Learning will not serve him without tact; and above all he must cultivate what is called a good manner both with judges and juries. We once heard a judge say of an eminent Queen's Counsel that there was something about his manner which made him want to give him the case whatever his own opinion might be as to the justice of his cause. But better far than the most transcendent abilities it is to have an uncle a solicitor. And now a word as to solicitors. There doubtless are many firms of solicitors who look after the interests of their clients in the matter of the employment of counsel with scrupulous honor, and who only give their brief to those whom they think most likely to conduct the case to the best advantage; but there are an increasing number of solicitors who adhere too closely to the Scriptural doctrine that it is a man's duty to provide for his own family first, and who intrust the interests of their clients to the care of their barrister relations, regardless of their incapacity to do more than scramble through the work somehow. It is, perhaps, natural that they should do so, but it is the presence of so many barrister-solicitors, or solicitor-barristers, which crowds out an immense number of really capable men who come to the Bar provided with brains but unprovided with interest. Some twenty or thirty years ago a man coming to the Bar with a University reputation, and with the patience to let the profession see that he meant to stick to it, was certain to make a living, sometimes a fortune. Now it is very long odds that he will not make either.

No doubt the prizes at the Bar are such as to make it worth while for a man to go through a good deal to gain them, and the excitement of a "talking" practice, when once obtained, seems to have a fascination which renders it impossible for him who has once experienced it ever to retire into private life again, whatever his personal means may be. Sir Edmund Beckett, the present leader of the Parliamentary Bar, who is supposed to have inherited two fortunes and to have made a third at the Bar, was once asked why he did not give up practice now that he was such a rich man, and he is said to have replied that "It was the cheapest amusement he could find." Probably there are many parliamentary barristers who wish that Sir Edward would invent a more expensive one.

The as yet briefless one has, however, many reasons for thinking his own profession is not such a hard one after all, even if he does not rise through the successive gradations of leading junior and Queen's Counsel, and a seat in Parliament to being Attorney-General and finally to the Bench; he knows that there are many little pickings in the shape of County Court Judgments and Police Magistracies, which cannot go outside his own profession.—*London Week.*

THE COMING CONFERENCE AT FRANKFORT.

The following is the programme of the Conference of the Association for the Reform and Codification of the Law of Nations, which is to be held at Frankfort on Maine, from the 20th to the 24th of August, 1878:

The Conference will hold its sittings at the *Saalbau*; and the Inaugural Meeting will take place on Tuesday the 20th of August, at 11 A. M. Members attending the Conference are required to sign a list, setting forth their names and their addresses at Frankfort. This list will be open for signature and inspection from 10 A. M. to 4 P. M., at the *Saalbau*.

Reception of the Members by the Burgo-master of Frankfort.

Opening of the Conference by the President.
Annual Report of the Council.

Communication of letters, etc.

Subjects of the reports, papers, etc.:

I. PRIVATE INTERNATIONAL LAW.

Bills of Exchange: Report.

Negotiable Securities. The plan of the *lex mercatoria* is the English system as regards negotiable instruments.

General Average: Report.

Patents of Invention. Trade Marks. Copyright.

Bankruptcy: Report.

Foreign Judgements: Report.

On the desirability of establishing a uniform practice for taking Evidence:

Foreign Tribunals in different Countries.

II. PUBLIC INTERNATIONAL LAW.

The first Rule of the Declaration of Paris.

Codification of International Law.

Extradition of Criminals.

The limits to Arbitration for the Settlement of International Disputes.

The Law of Maritime Capture.

The first Article of the Treaty of Washington.

The Rights and Duties of Neutrals.

Collisions at Sea.

Conventions for the Relief of Shipwrecked Mariners.

International Tribunals of Egypt.

MISCELLANEOUS PAPERS.

CURRENT EVENTS.

ENGLAND.

LIABILITY OF MASTER.—In *Charles v. Taylor*, 38 L. T. Rep. (N. S.) 773, decided by the English Court of Appeal on the 3rd of June last, it is held that where two persons are working for the same master, for a common general object, there is a common employment which exempts the master from liability to one of them for injury caused by the negligence of the other, although the work on which they are engaged is not the same. In this case, the plaintiff was hired by a man who had contracted to unload a coal barge at defendants' brewery, to assist in unloading; he was paid by the defendants, and defendants alone could discharge him. While employed in carrying coal, he was injured through the negligence of defendants' servants who were moving barrels in the brewery. It was held that there was evidence to justify a finding that plaintiff was

defendants' servant, and was engaged in a common employment with the person who caused the injury, and therefore he could not recover. The test in all these cases as to whether two persons employed by the same master are fellow-servants is, are they subject to the same general control, coupled with an engagement in the same common pursuit? If so, they are fellow-servants. *Wood's Mast. and Serv.* 837; *Rourke v. White Moss Colliery Co.*, L. R., 1 C. P. D. 556. In the latter case, workmen employed by a contractor who had engaged to sink a shaft for defendant, defendant agreeing to furnish the steam power necessary in prosecuting the work, were held to be fellow-servants of the engineer employed by defendant to run the engine furnishing the power. See, also, *Priestley v. Fowler*, 3 M. & W. 1; *Wiggett v. Fox*, L. R., 6 C. P. 24; *Illinois Cent. R. R. Co. v. Cox*, 21 Ill. 20. Also *Chicago, etc., R. R. Co. v. Murphy*, 53 id. 236; *Dalyell v. Tyrer*, E. B. & E. 899. See, however, *Swainson v. N. E. Railway Co.*, 38 L. T. Rep. (N. S.) 201; *Murray v. Carrie*, 23 id. 557; *Indermaur v. Dames*, 14 id. 564; *Bartonstill Coal Co. v. McGuire*, 3 Macqueen, 307; *Abraham v. Reynolds*, 5 H. & N. 143; *Smith v. Steele*, 32 L. T. Rep. (N. S.) 195.

PLANS FOR COURT USE.—The Lord Chief-Justice of England the other day alluded in terms of strong disapprobation to the unwieldy size of the plans which are prepared by those who are intrusted with the duty of making plans for the purposes of a trial. When a plan is produced in order to explain a case to a judge or jury it too frequently turns out to be of gigantic dimensions; folded in innumerable folds; far too large to be expanded with convenience on the judge's desk or on the counsel's table; concealing, when opened, every other paper within range of several square feet—in fact, a perfect nuisance to anybody who has to do with it. Frequently, there is no sort of pretence for this inconvenient amplitude, the plan proving to be nothing but a few colored lines, including vast blank spaces. We suppose the idea is to have a plan large enough to be seen by the jury when placed on the table at a distance from them. It would generally be far better to have a greater number of small plans for use in the jury-box; and in all cases where a plan is made for the use of the judge it should be of a handy size. No one who has not ex-

perienced it can be aware how troublesome it is, when a large plan is placed on a desk, to carry the eye from one point of it to another, and then when the judge requires a clear field in front of him for the purpose of taking notes, the plan has to be thrown aside somewhere, and then again it has to be picked up and spread out afresh when further reference to it becomes requisite. In most cases, a plan of very limited size would be sufficient for the purpose of elucidating a case. The Lord Chief-Justice half jokingly suggested that it would be a good thing if the masters would disallow the costs in respect of all plans above a certain size.

SCOTLAND.

A SOMNAMBULIST CONVICT.—According to the Scotch papers, a prisoner was recently convicted at Edinburgh of having, while in a state of somnambulism, murdered his child, and has since been set at liberty. Cases of this kind are very rare, but, assuming the somnambulism to be clearly proved, there can be little question of the correctness of the course adopted. Dornblüth, the German psychologist, tells of a young woman who, in consequence of a fright occasioned by an attack of robbers, was seized with epilepsy, and became subject to somnambulism. While in that condition she was in the habit of stealing articles, and was charged with theft, but on the advice of Dornblüth was released and eventually cured. Steltzer (cited in Wharton and Stillé) gives an account of a somnambulist who clambered out of a garret window, descended into the next house, and killed a young girl who was asleep there. And the same learned writers quote from Savarin an account of a somnambulist monk (related to Savarin by the prior of the convent where the incident happened): "The somnambulist entered the chamber of the prior, his eyes were open but fixed, the light of two lamps made no impression upon him, his features were contracted, and he carried in his hand a large knife. Going straight to the bed, he had first the appearance of examining if the prior was there. He then struck three blows, which pierced the coverings, and even a mat which served the purpose of a mattress. In returning, his countenance was unbent, and was marked by an air of satisfaction. The next day the prior asked the somnambulist what he had dreamed of the

preceding night, and he answered that he had dreamed that his mother had been killed by the prior, and that her ghost had appeared to him demanding vengeance; that at this sight he was so transported by rage that he had immediately run to stab the assassin of his mother." Savarin adds that if the prior had been killed the monk could not possibly, under these circumstances, have been punished.

UNITED STATES.

TREATMENT OF WITNESSES.—The *Albany Law Journal* says: "It is not an uncommon thing, at the present time, for a crime to be committed in the public streets of a city, during the busy part of the day, and the police be unable to discover who perpetrated it. A robbery took place in the streets of New York last week, a man who was carrying a package of money being attacked by several persons who tried to get the money from him. He threw the package to a telegraph messenger boy telling him to run away, which the boy did. The robbers pursued the boy and compelled him to deliver the package to them. There were a number of people in the streets who saw the affair, yet the robbers escaped with their booty, and no one could be found who could identify them. We wonder if it has ever occurred to the police, and other officials, engaged in the business of preventing or punishing crime, that the practice of imprisoning witnesses has anything to do with the difficulty experienced in finding out the circumstances surrounding the commission of such offences? It is a common caution given to strangers in New York, "If you see any crime committed, don't say anything about it, or you will be called on as a witness and put to trouble and expense." We are confident that if the practice of detaining witnesses, who are unable to find security for their appearance, were done away with, the difficulty now experienced in detecting and convicting those who commit the more dangerous kinds of crime would, in a large degree, be done away with. Occasionally an offender might escape because the witnesses against him would not appear, but those familiar with the facts connected with violations of the law would be more ready to disclose them, and this would much more than counterbalance any disadvantage resulting from the failure of witnesses, for the people, now and then to put in an appearance.

The Legal News.

VOL. I. AUGUST 24, 1878. No. 34.

MIDDLEMISS v. HOTEL DIEU.

The judgment of the Court of Queen's Bench at Montreal, in the case of *The Hotel Dieu of Montreal*, Appellant, and *Middlemiss*, Respondent, rendered on the 22nd of December last (*LEGAL NEWS*, p. 51), has been confirmed by the Judicial Committee of the Privy Council (13 July, 1878). The question was as to the right of the appellants to a commutation fine claimed from the respondent, Middlemiss, on certain property in the fief St. Augustin, by reason of his having obtained this property from the Crown in exchange for other property. The defence was that after the Crown acquired the property, it paid the indemnity due under the law in consideration of the extinction of all seigniorial rights; that these rights were then finally extinguished, and could not be revived by any sale or exchange that the Crown might thereafter make. The plaintiffs (the Hotel Dieu) replied that the indemnity paid represented only that indemnity which was payable by all *mains mortes* when they acquired immoveable property; that the tenure was only suspended, and when the property passed out of the hands of the Government the seigniorial rights revived. The Superior Court sustained the plaintiff's pretensions. In appeal this decision was reversed, Judges Monk and Tassier dissenting, and the judgment of the majority has now been affirmed by the Judicial Committee of the Privy Council. Their lordships hold that under the law of real estate as it was introduced into Canada, and as it existed here at the time of the transactions referred to, the acquisition by the Crown of lands held from a Seigneur as part of his fief, extinguished absolutely and for ever all feudal rights in such lands, and gave the Seigneur a mere right to an indemnity of one fifth of the price. The law being thus defined, their lordships further decided that the indemnity paid by the Government in 1860 was in fact the indemnity payable on the final extinction of feudal rights, and that the plaintiffs were entitled to nothing more.

The case has been very thoroughly and earnestly discussed, and their lordships compliment counsel on the great learning and ability with which it has been argued on both sides. It may be added that the proceedings before the Judicial Committee have been expeditious, the final decision being rendered within seven months after the judgment in our Court of Appeal.

THE SCOTTISH BAR.

There are many who lament what appears to them to be a great falling off in the learning, dignity, and greatness of the English bar. Goldwin Smith, in an address delivered before Convocation of McGill University, recognising the fact, ascribed it in some measure to the overshadowing influence of the solicitor branch of the profession, which renders success at the bar next to impossible unless the aspirant is favored with a relative who enjoys a good business as an attorney. An article which we copied in our last issue from the *London Week* took a similar view. A like decay in the bar of Scotland has also been deplored by some of its members, but Professor Lorimer comes to the defence of his associates, and, in a letter addressed to the *Scotsman*, stoutly resists the imputation that the bar is not equal now to what it was in what are regarded as its palmy days. At the same time he wishes the bar not to restrict itself to too narrow a field of activity. The letter is as follows:—

1 BRUNTFIELD CRESCENT,

JULY 17, 1878.

"SIR:—An addition to the bar of nine members in eight days, which has just taken place, is a social phenomenon too important to pass without notice in your columns. Nor is this all. The whole number for the year, I am told, is expected to be fourteen—the average for many years past having been eight. I do not profess to explain a manifestation of vitality so unequivocal in a body the decay of which was supposed, by many, to be a fact as incontrovertible as that of the Ottoman Empire. There is one explanation, however, which I can foresee will be given of it—not quite unwillingly, I fear, by those to whom, in its palmy days, it was an object of envy—I can at once put aside. The bar, they will say, has become democratic—it can no longer lay claim to the exceptional

advantages either in the culture or social position of its members, which it owed to its exclusiveness, and hence the increase in its members. The gain in quantity has been purchased at the sacrifice of those special qualities to which, in former times, so much value was attached. Now I can state, emphatically, as a matter of personal knowledge, that such an explanation would be wholly at variance with the truth. Whether we adopt intellectual or social tests, whether we take learning or refinement as our measure of value, the bar never received, during the long period I have known it, more valuable accessions to its ranks, than in the young gentlemen who have joined it at present, and during the last few years. So thoroughly, indeed, am I persuaded of this fact, that, with all the respect which I feel for the rapidly thinning ranks of my seniors, and with all the natural clinging which I have to those who are of my own age, or my immediate juniors, I do not hesitate to state it as my opinion that much of the best blood and brains and culture at the bar will be found amongst the men under ten years' standing. But if all this be true, even those of your readers who hear it gladly, may not, unnaturally, shake their heads when a brilliant future is predicted for the bar. The practice of the Court of Session they will say is falling off; the number of judgeships and sheriffships is being diminished; the office of Lord Advocate is in danger of being shorn of its political importance, and that of Lord Clerk Register is threatened with abolition, or, what is pretty much the same, with being transferred to London. What, then, are all those gifted and accomplished young fellows to do? What a prodigious waste of talent and energy must be going on in the Parliament House, and how many of those men whom you now regard as so promising, if no change for the better should occur in their prospects, must run utterly to seed. It is sadly too true; and the fact, I think, points clearly to the necessity of the bar vindicating for itself a wider field of activity than it has hitherto enjoyed, or than can now possibly be furnished to it by the practice of the law. The bar, meaning thereby the highest branch of the legal profession, must develop in this country, as it has done elsewhere, a political and official, as well as a legal side, and our university teach-

ing must be so expanded and adjusted as to prepare a class of specialists for this new sphere. To explain how this is effected in continental countries would involve an unjustifiable encroachment on your space. All that I can do for the present is to call the attention of your readers to a series of papers in the *Journal of Jurisprudence*, in which this is being done very fully, by my friend and colleague, Professor Mackay; and to the first article in the last number of that periodical, which is devoted to the subject. In urging the adoption of the course which I have here indicated, it will be seen from the information contained in Professor Mackay's articles that the writer, far from proposing a novelty, is only suggesting that this country should do what the rest of the civilized world has done already.

I am, etc., J. LORIMER."

INCIDENTS OF ENGLISH BAR PRACTICE.

The practice of the law in England is commonly supposed to be characterized by the most profound respect and decorum on the part of the bar towards the bench, while the members of the latter are presumed to live in an atmosphere too elevated and dignified to be affected by human infirmity or foible. A brace of incidents which we find in a single issue of an English journal (*Liverpool Post*, Aug. 2), are somewhat at variance with such preconceptions. The first is headed "A Scene in Court," and is as follows:

"During the hearing of the Herne Bay Waterworks petition in the Court of Chancery, London, on Wednesday, a scene occurred between Vice-Chancellor Malins and Mr. Glasse, Q.C., the leading counsel of the court. The Vice-Chancellor having stated that the case had better stand over till the November sittings, Mr. Glasse remarked on the inadequacy of the court to deal with the business.—The Vice-Chancellor: That is a very improper remark for you, as the leading counsel of the court, to make.—Mr. Glasse: The public will judge.—The Vice-Chancellor: Your remarks are of an infamous description. I wonder you have the audacity to make them.—Mr. Glasse (who spoke with suppressed excitement): I, standing here, will not condescend to tell your lordship what I think of you."

And the other relates to a gentleman who became famous as counsel during the second Tichborne trial :

"Mr. Justice Hawkins seems to have developed a singular passion for military costumes. At the Derby Assizes, the high sheriff appeared in court in ordinary morning dress, to the great disappointment of Mr. Justice Hawkins, who insisted that this gentleman should attend in uniform or other official attire. The high sheriff ventured to point out to his lordship that as he was not a deputy lieutenant of the county, and held none of those positions which carry with them the perquisite of a uniform, he could not very well conform to the judge's request. His lordship still refused to forego the gratification of seeing the high sheriff in uniform, and threatened that if his commands were not obeyed, he would next day fine that official £500. In vain did the high sheriff protest that in appearing in morning dress he was only following the practice of his predecessors. Mr. Justice Hawkins was inexorable, and the next morning, no doubt to his lordship's very great delight—the high sheriff presented himself in—the uniform of a captain of the Derbyshire Volunteers! Whether his lordship, who appears to be in these matters as punctilious as a Chinese Mandarin, will insist on uniform the next time he presides at the Derby Assizes remains to be seen."

And a third incident, which is depicted in the following little sketch from the *London World*, does not place English court proceedings in a more dignified light ;

"Divisional Court.—*Cor. KELLY, L.C.B., and MELLOR, J.*

"Eleven A. M.—At the conclusion of the *ex parte* motions.

"Mr. A.—Might I mention to your Lordship a case of *Snooks v. Jones*, which stands fifth on your Lordship's list? [The learned gentleman was here interrupted by another learned counsel, who made some communication to him.] I beg your Lordship's pardon; I find that it is now useless to apply to your Lordship. [Prepares to sit down.] The L.C.B.—What is the name of your case, Mr. A.—My Lord, the case is that of *Snooks v. Jones*; but—Mr. J. Mellor.—*Snooks* against what? Mr. A.—*Jones*, my Lord. The L.C.B.—How do you spell it? Mr. A.—J-o-n-e-s, my Lord. But as I said before

—The L.C.B.—One moment, pray. [Writes down the name.] Now will you have the goodness to tell us what the case is—what question is raised for the decision of this court, and in what form? Mr. A.—My Lord, I was just about to tell your Lordship—The L.C.B. [with some warmth].—Never mind what you were about to tell me, sir. If learned counsel would not constantly attempt to evade the questions of the court, the business of the court would be transacted in a much more rapid and satisfactory manner, and there would be a great saving of the public time. Mr. A.—My Lord, I was not attempting to evade your Lordship's questions; but with the object of saving public time, I ventured to think—The L.C.B.—I must trouble you not to venture to think anything until you have told us the facts. When the court is in possession of *all* the facts, it will then, and not till then, be in a position to listen to any application which you may wish to make. In the meantime, I must ask you to have the goodness to raise your voice. Mr. A. [in stentorian tones].—I do not wish to make any applica— The L. C. B.—You have not yet informed us for whom you appear. Mr. A.—For the plaintiff. But if your Lordship will bear with me one— The L. C. B.—Stop, pray; for the plaintiff, you say. Does any one appear for the defendant? Mr. A.—My learned friend, Mr. B. Mr. B.—I appear for the defendant, my Lord. I perhaps may be allowed to tell your Lordship— The L. C. B.—One at a time, please. Mr. A. is at present in possession of the Court; and I desire, in the first instance, to hear from him, if he will have the goodness to tell me, which he seems strangely reluctant to do, the facts, the whole facts, and nothing but the facts. [Mr. J. Mellor here left the court, and the facts, which were of an uninteresting and complicated nature, were gone into. Owing to the defective acoustic properties of the building, frequent repetition was necessary, and an hour and a half were thus consumed. Mr. J. Mellor returned.] The L. C. B.—Very well, you have explained the facts lucidly and clearly, and we shall now be most happy to hear the nature of your application. Mr. A.—My Lord, I have no application to make. (Laughter). The L. C. B.—I must really beg—nay, if necessary, I must insist—that there be no unseemly inter-

ruption to the business of this court. [To Mr. A.] You say you have no application to make. Will you have the goodness to tell me then, why you are taking up the time of the court? Mr. A.—My Lord, I was about to ask your Lordship to allow this case to stand over until to-morrow, with the consent, as I was informed, of my learned friend on the other side. As I was about to apply to your Lordship, I was told by my learned friend, who entered the court at that moment, that he had given no such consent, and I therefore desired to withdraw my application. The L. C. B. [after consultation with the officers of the court.] Of course, without the consent of the other side, we can make no such order. The case will retain its place on the list.

"The court then adjourned for luncheon."

It is fair, however, to suppose that these incidents are but as the spots on the sun, and do not detract from the general splendor and dignity of the English bench.

A GREAT CHANCELLOR.

[Continued from page 393.]

In 1820 occurred the trial of Queen Caroline, which forms one of the most disgraceful pages of English history. For his conduct in lending encouragement to this unfortunate proceeding, Eldon has been often and severely blamed, and, it must be admitted, with sufficient reason. He had in former years been a warm friend of the unhappy queen, dining often at her table, and acting in many things as her confidential adviser and supporter. But after the accession of George IV. to the regency, and his strenuous endeavors to bring about a judicial separation from Caroline, a change was gradually discernible in the attitude of the chancellor toward this unfortunate woman, which has been not unreasonably ascribed to his anxiety to retain the favor of his sovereign by yielding to his wishes in that behalf. Certainly, if, with his strong influence over the regent, and his extraordinary ascendancy in the House of Lords, Eldon had put his face resolutely against the persecution of the queen, the disgraceful proceedings which followed might have been spared. Unfortunately for himself he chose to trim his sails to meet the royal favor, and yielded to the wishes of the king. Lord Liverpool accordingly introduced, with the approval

of the ministry, his "Bill of Pains and Penalties against her Majesty," charging her with adulterous intercourse with her Italian servant. Even then, when the government was fairly embarked upon this perilous prosecution, the chancellor might well have saved himself the reproaches which were heaped upon him, had he maintained a discreet silence, declining, as he might well have done, to participate in the discussions leading to the hearing. But, with a strange fatuity, he did not scruple to ally himself openly with the supporters of the bill. Erskine having moved that the queen be furnished with a list of the witnesses against her, and having supported his motion with a manly speech, Eldon spoke warmly in opposition to the motion, thus denying to the queen the privilege to which the meanest subject would have been entitled upon an indictment. Erskine afterwards moved that, as the charge contained in the bill extended over several years and over many countries in Europe and Asia, the queen should, for the purpose of preparing her defence, be furnished with a specification of the times and places when and where the offence was charged to have been committed. This motion, also, was opposed by Eldon in a formal speech.

But during the entire course of the trial, in which the fervid eloquence of Denman and Brougham in defence of their client recalled the forensic splendors of the Hastings impeachment, Eldon's conduct as presiding officer of the lords and president of the court was deserving of the highest praise for the judicial dignity and absolute impartiality which it displayed. And it was not until the evidence and arguments were concluded, and the bill stood upon its second reading, that he again left the wool-sack, assumed the role of partisan, and delivered a vigorous speech in support of the bill. The second reading was carried by a majority of only twenty-eight. This small majority, with a growing sentiment everywhere apparent in sympathy with the queen, should have warned the government against further proceedings; but, with a strange fatuity, they continued to press the bill to its third reading, Eldon again speaking in its support. The third reading was carried by a majority of only nine votes, and the ministry, conscious at last of the futility of further proceedings, moved that further con-

sideration of the bill be postponed six months; and it was subsequently withdrawn. Lord Eldon's connection with this miserable phase of English history must be dismissed without excuse, since it is utterly inexcusable.

In 1821 he was raised to an earldom by the king, whose cause he had served so well. The royal patent conferring the new honor recited that it was bestowed in consideration of the "distinguished ability and integrity which he had invariably evinced in administering the laws in his office of chancellor during the period of nineteen years." He took his seat in the House of Lords shortly afterwards as an earl, and was warmly greeted by his brother peers of all parties, with whom he was always a universal favorite.

He was much annoyed during this, the second, period of his chancellorship by the frequent complaints of delay in the business of his court, and he seems to have been exceedingly sensitive to criticism upon this point. These complaints seem to have increased as his term went on, and in 1811 they had become so frequent that he was reluctantly compelled to refer the subject to a select committee in the House of Lords, and a motion was made for a similar committee in the Commons. Jeremy Bentham, whose iconoclasm in all matters of law reform could ill brook the conservatism of Eldon, was especially bitter in his abuse of the chancellor because of the delays in his court. And the fifth volume of Bentham's published works contains a most bitter philippic directed against Eldon and his court because of the delays and expenses incident to chancery litigation. Indeed, Bentham seems to have hated him from first to last with the most malignant and unsparing hatred, and omitted no opportunity of giving expression to his spleen.

The press, too, lent itself to the propagation of absurd rumors concerning the chancellor's delays. It was asserted that many who had large sums of money due them, locked up in chancery, owing to the doubts and delays of the chancellor, actually died of poverty and a broken heart; and that their ghosts might be seen between midnight and cock-crow sitting around the accountant general's office. Equally absurd stories were invented of a cargo of ice having melted away, and a cargo of fruit having

rotted away, while the chancellor was doubting what his judgment should be upon a motion for an injunction.

One Taylor, a member of the House of Commons, came to be known as especial guardian of litigants in chancery, and at each recurring session of Parliament, year after year, he introduced a resolution calling for an investigation of the delays in the Court of Chancery. How sorely these complaints vexed the chancellor is apparent from a letter of his written in 1812, a committee of the Commons being engaged in one of these investigations. He writes: "I have now sat in my court for about twelve months, an accused culprit, tried by the hostile part of my own bar, upon testimony wrung from my own officers, and without the common civility of even one question put by the committee to myself in such mode of communication as might have been in courtesy adopted. When I say that I know that I am, and that my officers and that my successors will be, degraded by all this, I say what I think I do know."

But while the chancellor was not wholly blameless for the great delay in the dispatch of business, the fault was more the fault of the system than of the judge who administered it. The country had outgrown the Court of Chancery. The court had still but two judges, the lord chancellor and the master of the rolls, just as there had been since the reign of Edward I., while its jurisdiction and its business had increased tenfold.

So great had become the complaints of the existing system that, in 1813, Lord Eldon procured the passage by Parliament of a bill for the appointment of a vice-chancellor, for the double purpose of relieving the Court of Chancery and the House of Lords, where appeals and writs of error had accumulated so that it was many years behind in its appellate judicial business. Campbell, with his accustomed sneer, remarks upon this measure: "I am sorry that the vice-chancellor's bill, which had become indispensable for Lord Eldon's own convenience, is the only instance of his doing anything for the improvement of our institutions."

But however little he may have done for the improvement of English institutions or English laws, he certainly dispatched an immense

amount of judicial business; and except when engaged in the Cabinet, he devoted himself with unremitting zeal to his judicial duties. Much of his business was in the hearing of interlocutory motions, but these practically had the effect in many cases of final decrees. After the Vice-Chancellor's Court was established, counsel were in the habit of bringing forward before Eldon motions in causes pending before the vice-chancellor for the purpose of getting his opinion, and thus saving the expense and delay of further proceedings. And counsel would frequently frame a bill for an injunction or a receiver for the purpose of bringing on a motion before the chancellor, and thus obtain his opinion upon the subject-matter of the dispute. So great was the respect of the bar for his opinions that his decisions upon these interlocutory motions were often taken as final and conclusive between the parties. And there hardly seems sufficient ground for the statement attributed by Brougham to certain wits of the time—that the chancellor's court was the court of *oyer sans terminer*, and the vice-chancellor's that of *terminer sans oyer*.

He continued to hold the great seals until the dissolution of Lord Liverpool's ministry, in 1827, when, owing to the illness of Liverpool, Mr. Canning was called to the head of the government, and all the anti-Catholic members of the Cabinet, including Eldon, tendered their resignations, which were at once accepted. He continued to sit in the Court of Chancery for a period of three weeks, disposing of causes that had been argued before him, and on May 1, 1827, he surrendered the seals to the king at Carlton House. He had held the office longer than any of his predecessors, the total duration of his chancellorship, including both terms, lacking but a few weeks of twenty-five years.

Lord Eldon passed from the court which he had so long adorned into private life with the good wishes and esteem of the entire bar. Indeed, from his first entry into the law he had been a favorite with both branches of the profession. And this continued during his occupancy of the woolsack, notwithstanding his somewhat miserly distribution of professional honors. One of the especial prerogatives of the English chancellors is that of rewarding merit at the bar by nominating deserving barristers to the honor of King's Counsel, a rank entitling

the recipient to don the silk gown and sit within the bar. Eldon had himself obtained his promotion after only seven years' practice, while Campbell complains of his withholding from him the coveted silk after he had been twenty years at the bar, and for several years the leader of his circuit; and mentions other instances of still greater injustice. He was, too, severely blamed for withholding their well-earned professional advancement from Denman and Brougham, who had given mortal offence to George IV. by their spirited defence of Queen Caroline.

He was also much criticised for his inattention to the social duties of his station, and his neglect of the hospitalities usually extended to the profession by the chancellors. And, to one familiar with the rigid etiquette of the English bar in matters of this nature, it is not surprising that these charges assumed more serious importance than their cause would seem to demand. But despite his faults of omission in these minor details, he had so endeared himself to the entire profession that his surrender of the seals was universally regretted.

The limits of this paper will neither permit an extended review of his judicial career nor admit of an exhaustive analysis of his character as a judge. It is only proposed, therefore, to sketch in brief some of the leading characteristics of his judicial record. Nearly fifty closely-printed octavo volumes of reports contain the record of his decisions as an equity judge. Next to the profound knowledge amounting to a complete mastery of the science of equity, as well as of its practice and procedure, which is apparent upon every page of these reports, their most noticeable feature is the proneness of doubt which Eldon everywhere displays. In this respect he has become proverbial. Again and again he sums up a case in the most masterly and comprehensive review of the principles and precedents applicable to the questions involved, only to conclude with an expression of his doubts as to the correctness of his own views, and a desire for further and more mature consideration. In an opinion fairly luminous with its profound insight into the equitable principles which should govern the case, he would challenge the admiration of the entire bar who were listening, only to end with an expression of his doubts and a *curia*

advisari vult. And the remarkable feature of all was that he himself was the only person who doubted. Lyndhurst, who succeeded him, stated the case epigrammatically in a speech in Parliament in 1829, when, alluding to Eldon, he used these words: "It has been often said in the profession that no one ever doubted his decrees except the noble and learned lord himself." And the words were no unmeaning compliment, since it is said by Campbell that only two of his decisions were ever reversed by the House of Lords.

He himself was not insensible to his weakness, and in his "Anecdote Book," a sort of fragmentary autobiography in manuscript, which he wrote in his later years for the entertainment of his grandson, he thus excuses his faults of hesitation—and very satisfactorily, it must be confessed: "I always thought it better to allow myself to doubt before I had decided, than to expose myself to the misery, after I had decided, of doubting whether I had decided rightly and justly." And he seems to have guided himself by the advice of the celebrated French chancellor, D'Aguesseau, to his son: "My son," said the chancellor, "when you shall have read what I have read, seen what I have seen, and heard what I have heard, you will feel that if on any subject you know much, there may be also much that you do not know; and that something even of what you know may not, at the moment, be in your recollection; you will then, too, be sensible of the mischievous and often ruinous consequences of even a small error in a decision; and conscience, I trust, will then make you as doubtful, as timid, and consequently as dilatory, as I am accused of being."

He was, moreover, proverbially slow in the hearing of causes, encouraging rather than restricting argument, and willingly hearing all the counsel on either side, juniors as well as seniors, without restriction or hindrance. Upon this point, he says, in the case of *Ex parte Pease*, 1 Rose, 237: "I know a great deal of time is consumed in hearing arguments, but a great deal of justice is the result."

Three objects he seems to keep prominently in view in all his judicial decisions. These he states in his opinion in *Attorney General v. Skinner's Company*, 2 Russ. 437, as follows: "Looking back to my judicial conduct—I hope

with no undue partiality or self-indulgence—I can never be deprived of the comfort I receive when I recollect that in great and important cases I have endeavored to sift all the principles and rules of law to the bottom, for the purpose of laying down in each new and important case as it arises something, in the first place, which may satisfy the parties that I have taken pains to do my duty; something, in the second place, which may inform those who, as counsel, are to take care of the interests of their clients, what the reasons are upon which I have proceeded, and may enable them to examine whether justice has been done; and, further, something which may contribute towards laying down a rule, so as to save those who may succeed to me in this great situation much of that labor which I have had to undergo by reason of cases having been not so determined, and by reason of a due exposition of the grounds of judgment not having been so stated."

Again, he says in his "Anecdote Book": "I thought it my indispensable duty as a judge in equity to look into the whole record, and all the exhibits and proofs in cases, and not to consider myself as sufficiently informed by counsel. This I am sure was right." And he once narrated, with much satisfaction, that Lord Abergavenny had told him that he had compromised a suit because his attorney had told him there was a weak point in his case, which, though the opposing parties had not discovered it, "that old fellow" would be sure to find out if the case came before him.

His judicial style has been severely criticised, and his opinions are by no means models of rhetoric. His sentences are generally long, frequently involved, and his choice of terms is not always elegant when tested by literary standards. But it is to be remembered that his opinions, like those of most English judges, were always delivered extemporaneously, and that he rarely made use of the aid of notes. Unless in one or two cases which he decided by consent of the parties after he resigned the great seal, he never put pen to paper in preparing his opinions. It is to be remembered, too, that from the time when he began to fit himself for the bar he utterly relinquished literature, and while he did not, like Blackstone, bid farewell to his muse in atrocious verse, the

parting was none the less final and complete. But it may well be doubted whether his complete abandonment of literature, even as a recreation, detracted in any degree from his transcendent ability as a judge. The span of life is too short, and the law is too jealous a mistress to permit one to attain the highest rank as a jurist, and acquire even a smattering of literary culture.

[To be continued.]

SOME HUMORS OF THE LAW.

We are not so young as we were when we commenced the publication of the *Albany Law Journal*, and ought to, and perhaps have, grown graver with our added years. And yet we think that a little intellectual disporting, especially in the dog days, is good for us and for our readers. If we keep ourselves and our patrons on the incessant mental strain necessary to the ordinary and habitual perusal of our columns, there would be no answering for the consequences. Therefore, we have been casting about for some legitimate legal object for the exercise of that graceful humor, for which, we think we may say without undue, or at least unusual, vanity, we are noted. But we must say that the law has been rather dull of late, somewhat destitute, in fact, of those funny cases which alleviated our youthful career. To be sure, there was the recent case in North Carolina (*State v. Neely*, 74 N. C. 425; 16 Alb. L. J. 382), where the jury found the negro guilty of an attempt to commit a rape, because he shouted to and ran after a white lady, although he did not say a word on the subject of rape, and the court sustained the verdict upon general theories of the tendency of the African beast to do what the jury thought he was going to do in this case. But, on reflection, we deemed that case rather too serious to be treated lightly, and we hope we have not said a word on the subject that can be construed otherwise than seriously. The last volume of the American Reports gives us a little timely relief. There we find several cases that will bear a little humorous treatment.

For instance, *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22. The first paragraph of the syllabus is to the effect that, to entitle one to relief for alleged infringement of a trade-mark,

the resemblance of the two marks must be so close as to amount to a false representation of the manufacture or proprietorship of the article. This is all well and serious. But in the next paragraph the reporter grows ambiguous. He continues: "The plaintiff put upon packages of lard the figure of a fat hog, with his name" —(the plaintiff's, probably, not the hog's)—"and the words 'prime leaf lard.' Defendant put upon packages of lard a globe with a small lean boar on top, above which was his name" —(it *must* have been the defendant's, not the boar's)—"and beneath it the words 'prime leaf lard.'" Otherwise the packages were quite dissimilar. This was held no infringement. Judge Allen, in whose amiable disposition was always a sly sense of fun, remarked: "The shape and general appearance of the pictured animals upon the two brands, and their position, the one upon a globe and the other without such a support; the one representing a small lank, and lean wild boar, and the other a large, fat and well-conditioned domestic animal, are so entirely dissimilar that the one can hardly be said to be an imitation of the other, and clearly not a fraudulent or deceptive imitation." Here was certainly a *world* of difference. But is it quite clear that, even with that distinguishing mark, the average buyer would note the difference in sex, amount of flesh and tameness? Right here, let us suggest to Mr. Cole that he would do much better to put his boar under rather than above the globe, for thus he might make a graceful reference to the ancient theories of the support of the world, and a symbolical allusion to the importance of the hog in commerce, which would be appreciated in Cincinnati, if nowhere else. But Mr. Cole was a lucky man compared to Mr. Crump, defendant in *Colman v. Crump*, the case of the "Bull's Head Mustard," in which Mr. Crump was restrained by the Supreme Court from putting a bull's head upon his packages of mustard, because the plaintiff had previously adopted it as his trade-mark, and although Mr. Crump's bulls were quite distinguishable from Mr. Colman's by a careful observer. Mr. Crump should have used a cow, and stood her on a hay-stack, and he would have been protected. But we must not say any thing further on the latter case, for it is on appeal, and we would not wittingly influence

the opinion of the Court of Appeals. Our own impression is, however, in regard to *Popham v. Cole*, that the matter of sex would be as little observed in the commercial world as the sex of the swimmers who were observed by Charles Lamb. A lady called his attention complainingly to some boys bathing in some distant water. "Are those b-b-boys?" said Lamb; "I thought they were g-g-girls."

We now pass to a case of gigantic importance—*Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322. This was an action to recover damages for a disrespectful article in a newspaper on the "Cardiff Giant." The plaintiff alleged that the giant was a great scientific curiosity and had been a source of profit to him as an exhibition;—we know that is true, for half Albany, including ourselves, paid to see it;—but that a sale of it had been defeated by the article in question, which called the giant a humbug, a sell and a fraud, and, worse than all a "monolith," stating that "the man who brought the colossal monolith to light confessed that it was a fraud." A verdict for the defendant was sustained. We have little doubt that this arose from the fact that the editor swore, as the report shows, that he designed the article as humorous. We don't believe in hurting an editor for writing anything that he can conscientiously swear he supposed was funny. Speaking of "colossal monoliths" reminds us of another recent case, singular, if not exactly humorous, and that is, the action in an English court for salvage of Cleopatra's Needle, abandoned at sea. The plaintiff in that case acquired a large fortune by the adjudication of the court, and all because his mother had taught him when a boy to pick up every pin and needle that came in his way. We would not make invidious distinctions, but really it seems to us that the Cardiff Giant, if not so ancient, is fully as curious and interesting a proof of the skill and ingenuity of man as Cleopatra's Needle. Besides, there is but one Cardiff Giant, and never will be another, it is safe to say; while of Cleopatra's Needles the world possesses, so to speak, a whole paper. But let us emphasize the point we wish to make—that the editor's humor was what saved him. How could a verdict ever be obtained against *Punch*, for instance?

Again, the case of *Sterling v. Drake*, 29 Ohio, 457; 23 Am. Rep. 762, deserves chronicling in this connection. A statute of Ohio provides that a reprieve granted to any person under sentence of death, on any condition whatever, shall be accepted in writing by the prisoner. *Held*, that a postponement of execution to a specified day was not conditional, and need not be accepted, but the execution might then be carried into effect. The court very gravely remark: "The object sought to be accomplished by this section would, in my opinion, constitute a *pardon* instead of a reprieve upon conditions;" the section "evidently contemplates a punishment other than the execution of the person under sentence of death, and he is required to accept the modification on the theory that a punishment different from that imposed by the sentence of the court cannot be thrust upon him by the governor without his consent." This is the most extraordinary case of caution we ever heard of. It would seem quite unnecessary to provide for the imaginary case of a person who should insist on being hanged. This is a match—which we did not suppose could ever be found—for the act of our Legislature (Laws of 1863, ch. 415), providing that prisoners, by good behaviour, should be entitled to certain deductions from the terms of imprisonment, but that this should not apply to the case of a person sentenced for life! Verily, legislatures are more cautious than wise. Perhaps, however, the Ohio Legislature had heard of the case of the Frenchman, not very conversant with our language, who fell into the water, and was left to drown, because he cried: "I *will* be drowned, nobody *shall* help me!"

The first two cases would be useful to Mr. Ivins (see 18 Alb. L. J. 25), if he were disposed to continue his researches into the law reports as aids to a history of the times. The rivalries of commerce and the trickeries of showmen are not new, but they are more ingenious now, perhaps, than they were of old time. Human nature is just about the same the world over, in all times, but civilization enables men to overreach their fellow-men more adroitly than a mere barbarian could do. As for the men who draft laws, we doubt whether any thing could make them any wiser—or any more stupid—than they generally are.

We have before this written on "law for the dog-days," and we now find some recent cases under this head. In *Heisrodt v. Hackett*, 34 Mich. 283; 22 Am. Rep. 529, it was decided for all time that a dog is not a "person." This was held in an action for the killing of the plaintiff's dog by the defendant's dog, in which the defendant tried to justify himself (or his dog) under a statute authorizing "any person" to kill a dog at large, and without a collar. This, we should say, is the inevitable grammatical construction, but the court try to give a reason, and say that the Legislature "contemplated that some judgment would be exercised by the person before killing the dog," but "no such judgment or discretion could have been exercised in this case." From our knowledge of men and dogs, we are inclined to believe that these are both rather violent presumptions.

In Massachusetts they are very particular about dogs and the Lord's day. We don't know what they would do to dogs that should be caught fighting on Sunday. In the last volume of the Massachusetts reports we find two dog cases. One is *Searles v. Ladd*, 123 Mass. 580, an action for damages for a dog bite. The plaintiff was a lady, who had been purchasing some meat at a provision dealer's shop and had placed it in a satchel under her arm. As she was going out of the door, a dog, with a strap-muzzle on, lay there, and she remarked to him, "Doggie, ain't you going to let me out?" In spite of this endearing diminutive the dog made no reply, but rose up and bit the wrong meat. The lady got a verdict, of course, in spite of the muzzle and of her undue familiarity in addressing a dog to whom she had never been formally presented. *Commonwealth v. Brahaney*, 123 Mass. 245, was a complaint for keeping an unlicensed dog. The license was for a yellow and white dog called "Dime." The proof showed the keeping of a black male dog called "Nigg." This was held to be a clear case of an unlicensed dog. The mistake came about from the miscarriage of the defendant's agent, who was evidently color-blind, and would seem to have been a silver partisan rather than an abolitionist. What they did with the guilty man does not appear. We only hope they did not hang him, but they are such a virtuous people over there that there is no

telling what they might not do to such a gross offender.

But to see how much more consideration is given to a dog in our State than to a "nigger" in North Carolina! We have seen what the presumption and punishment are where a colored man runs after and calls to a white woman in the latter State. Now, in our State, in *Smith v. Waldorf*, 13 Hun. 127, an action to recover the value of a cow, which the plaintiff, having found trespassing upon his lands, had set his dog upon, and which had jumped over a fence in trying to escape the dog, and hurt itself, it was decided that, as there was no proof that the dog did anything more than run after and bark at the cow, and no pretense that he bit her, and as it appeared that he was always at a considerable distance from her, and that her injuries were sustained on account of her fright, and were accidental, the action could not be sustained. So the darkey did not come anywhere near the woman, and did not hurt her, but only ran after and "barked" at her, but it was all of no use;—he meant rape, the court said, and must be punished for the intention. On similar principles the owner of the dog ought to have been held liable for the injury to the cow. But our courts make a great deal of allowance for natural propensities, and we hardly think they would have punished the colored brother for his act toward the timorous lady, but they would have assumed that he merely meant to "pass the time of day," or inquire his road.

RECENT UNITED STATES DECISIONS.

[Selections have been made from 58 Georgia; 28 Grattan (Virginia); 74 Illinois; 56 Indiana; 45 Iowa; 28 and 29 Louisiana Annual; 122 Massachusetts; 12 Nevada; 67 New York; 11 Rhode Island; 47 Texas; (Civil Cases); 2 Texas Court of Appeals (Cr. cases), and 42 Wisconsin; also from 95 United States.]

Action.—1. Plaintiff, being injured by reason of the accumulation of snow on a sidewalk, sued S., the owner of the adjoining estate, who was bound by city ordinance to remove the snow. *Held*, that he could not recover.—*Heaney v. Sprague*, 11 R. I. 456.

2. In an action against a city, the declaration averred that the defendants licensed one J. S.

to exhibit in the streets wild animals to wit, two large cinnamon-colored bears, whereby the street was obstructed, and plaintiff's horse frightened and rendered unmanageable, and plaintiff's wife injured. *Held*, good on demurrer.—*Little v. Madison*, 42 Wis. 643.

3. Plaintiffs insured the life of J. S., who was wilfully killed by defendant, and plaintiffs paid the insurance. *Held*, that they could not recover over against defendant.—[*Mobile Life Ins. Co. v. Brame*, 95 U. S. 754.

Admiralty.—A contract for wharfrage is a maritime contract, and within the admiralty jurisdiction.—*Ex parte Easton*, 95 U. S. 68.

Alteration of Instruments. A promissory note was indorsed by defendant before it was negotiated; afterwards, the maker, without defendant's assent, and at the request of the payee, to whom he gave the note for his own debt, added the word "agent" to his signature. In absence of evidence that his principal was accustomed to pay notes drawn in this form, *held*, that the alteration was immaterial, and, therefore, that defendant was not discharged.—*Manufacturers' Bank v. Follett*, 11 R. I. 92.

Amendment.—A surviving partner and the administrator of his deceased partner brought an action, declaring for goods sold and money lent by them, and made an attachment, which was dissolved by giving bond with sureties; afterwards, the surviving partner amended by striking out the administrator as a party, and declaring anew for goods sold and money lent by the partnership, and by himself as surviving partner, in winding up the business. *Held*, that the sureties on the bond were discharged.—*Quillen v. Arnold*, 12 Nev. 234.

Assault.—Indictment for assault and battery. Defence, that the prisoner, as master of a public school, *moderate castigavit* the prosecutor, as an unruly pupil in the same. *Held*, a good defence, though the prosecutor, was not entitled by law to attend the school; for if he attended it, though wrongfully, he was subject to its discipline.—*State v. Mizner*, 45 Iowa, 248.

Bankruptcy.—An executor improperly sold assets of the estate at an undervalue. A bill was afterwards filed against the purchaser to compel him to make up the deficiency, to which he pleaded a discharge in bankruptcy. There being no evidence of actual fraud by the purchaser, *held*, that the claim was not a debt cre-

ated by his fraud, within the meaning of the Bankrupt Act, and, therefore, that the discharge was a good bar to the bill.—*Neal v. Clark*, 95 U. S. 794; reversing s. c. 25 Gratt. 642.

Bills and Notes.—1. On the day when a promissory note fell due, the indorsers wrote on it, "We hereby waive protest on this note, and hold ourselves responsible for the payment of the same, which is hereby extended thirty days." *Held*, that neither protest nor notice, at the expiration of the thirty days, was required to charge the indorsers.—*Blanc v. Mutual Bank*, 28 La. Ann. 921.

2. Two promissory notes being due and unpaid at several times, and the indorser of both having deceased testate, notice was given to the person named as executor in his will, who had, at the time the first note fell due, presented the will for probate, but, before the second note was due, had renounced the executorship, and a special administrator had been appointed; but no public notice had been given of the latter's appointment. *Held*, that the notice was sufficient as to the first note, but not as to the second.—*Goodnow v. Warren*, 122 Mass. 79.

3. A bill of exchange, indorsed "Pay A. or order on account of B.," was sent by A. to his correspondent C., and paid to C. by the drawees. A. failed about an hour before this payment, in debt to C., and his failure was known about an hour after the payment. C. applied the payment to reducing his claim against A. In an action against him by B. to recover the amount of the payment, *held*, that the indorsement was notice that B. was the real owner of the bill; that C., not having paid the money to A. before notice of his failure, could not apply it afterwards to his claim against A.; and that B. was entitled to recover.—*Blaine v. Bourns*, 11 R. I. 119.

Carrier.—1. A bill of lading which stipulated that the carrier would transport the goods without transfer, in cars owned or controlled by him, contained also a clause exempting him from liability for loss by fire. The goods while in transitu were unloaded, and while awaiting re-shipment were destroyed by fire. *Held*, that the carrier was liable.—*Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470.

2. The owner of a patent car-coupling, who was negotiating for its use by a railway company, went, at the request of the company, and in their cars, to see one of their officers about

the matter, the company giving him a free pass, on the back of which were printed conditions exempting the company from any liability for injury by negligence of their servants or otherwise; and on the passage was injured through the company's negligence. *Held*, that the pass was given for a consideration; that he was therefore a passenger for hire, and not barred, by the conditions of the pass, of his remedy against the company.—[*Grand Trunk*] *Ry. Co. v. Stevens*, 95 U. S. 655.

Check.—1. The holder of a check procured it to be certified by the bank on which it was drawn, and then indorsed it to another person. *Held*, that the latter might still hold his indorser, as well as the bank.—*Mutual Bank v. Botgé*, 28 La. Ann. 933.

2. The holder of a check brought it to the bank on which it was drawn, and asked to have it certified, expressing doubt whether it was genuine in all respects. The teller certified it as correct in every particular. In fact the signature was genuine, but the body of the check had been altered. *Held*, that the legal effect of certification was only to warrant the signature; that evidence that it was understood, by the custom of merchants, to warrant anything more was inadmissible; that the teller had no authority to warrant anything more; and that his act in doing so did not bind the bank.—*Security Bank v. Nat. Bank of the Republic*, 67 N. Y. 658. But see *Louisiana Bank v. Citizens' Bank*, 28 La. Ann. 189, *contra*.

Citizen.—A citizen of the United States, while residing in Canada, served in the militia, in the war of 1812, but on compulsion, and not voluntarily, and received pay for his service. *Held*, that he did not lose his citizenship.—*State v. Adams*, 45 Iowa, 99.

Constitutional Law (State).—By the Constitution of Virginia, no one who takes part in a duel shall be allowed to hold any office. *Held*, that any person committing the offence might be removed from office by *quo warranto*, without a previous conviction of the offence in a criminal court.—*Royall v. Thomas*, 28 Gratt. 130.

Corporation.—1. A stockholder was refused permission to examine the books of the corporation. *Held*, that the corporation was compellable by *mandamus* to allow an inspection by the stockholder's agent, as well as by himself.

—*State v. Bienville Oil Works Co.*, 28 La. Ann. 204.

2. A corporation entered into a partnership with an individual, to be determined at will by the corporation. Nothing in the name or charter of the corporation indicated the business to be done by it, and all its stock was held by one person. *Held*, that the contract of partnership was not *ultra vires*.—*Allen v. Woonsocket Co.*, 11 R. I. 288.

Damages.—1. Where an act was punishable as a criminal offence, *held*, that, in a civil action to recover damages for the same act, exemplary damages were not recoverable, by reason of the constitutional principle that no one shall be twice punished for the same offence.—*Keorner v. Oberly*, 56 Ind. 284.

2. A traveller, injured by reason of an obstruction in a highway, brought an action against the town in which the way was situate; and the town notified the person who had made the obstruction, and requested him to defend the action, which he failed to do, and judgment was recovered against the town. *Held*, that the town might recover over against the person so notified, not only the amount of the judgment, but the reasonable expense of defending the action, including counsel fees.—*Westfield v. Mayo*, 122 Mass. 100.

3. A passenger on a railroad being unable to find a seat, except in the smoking car, or in a car reserved for ladies, entered the latter peaceably, not being forbidden by any one; and a brakeman afterwards, while the train was moving, and without requesting the passenger to depart, ejected him from the car, using no more force than was necessary for that purpose. The conductor of the train was informed of the facts; and the passenger afterwards sued the railroad company, who, after service of process in the action, retained and promoted the brakeman in their service. *Held*, that they were liable in exemplary damages if they ratified their servant's act, and that the evidence warranted a finding that they did ratify it.—*Bas v. Chicago & N. W. Ry. Co.*, 42 Wis. 654.

The first application by a woman for admission to the California bar was made at the opening of the July term of the Supreme Court of that State, by Mrs. Mary Young, of Sacramento. She failed to pass a satisfactory examination, and was rejected.

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THE MACKONCHIE CASE.

We had occasion, in an early issue of the present volume, to advert to a remarkable judgment of the Superior Court, at Quebec, which expressly overruled and set at defiance a judgment of an appellate tribunal, the Court of Queen's Bench. A somewhat similar incident has caused some sensation in England. It has occurred in one of the famous ecclesiastical suits which seem to upset the minds of learned judges as well as of common mortals. The Rev. Mr. Mackonochie, some time ago, was suspended from his clerical functions for three years, for contempt of the Court of Arches in refusing to obey a decree directed against his ritualistic practices. The Court of Arches, in this proceeding, was acting in accordance with the law as it had been laid down in judgments of the Judicial Committee of the Privy Council, and Lord Penzance little dreamed that the authority of his decree could be questioned. But resort was had to the Queen's Bench Division of the High Court of Justice, and this tribunal, to the surprise of the public and the bar, has ordered a writ of prohibition to issue against the enforcement of the decree of suspension.

The *Times* thereon remarks: "A much more important issue than the enforcement of Lord Penzance's decree is indirectly involved. A majority of the Court of Queen's Bench have repudiated principles of law established by judgments of the Judicial Committee of the Privy Council, and have substantially ignored the legal authority of that high appellate tribunal. The revocation of the sentence passed upon Mr. Mackonochie implies that Lord Penzance was mistaken as to the powers of his office, and that the Judicial Committee of the Privy Council shared in the responsibility for his mistake. This decision reverses the judgments of the Privy Council in a manner so bold that the Lord Chief Justice felt bound to justify it by contending that it was the judicial duty of the Queen's Bench in the exercise of its power of prohibition to review the acts, and if

it seemed right, to reverse them, of every tribunal not a branch of the High Court."

The name of the Lord Chief Justice (Sir Alexander Cockburn) carries great weight, and Mr. Justice Mellor concurred with him in his startling assumption of authority. But it should be mentioned that Mr. Justice Lush dissented, and he put his dissent upon the easily understood ground that the Queen's Bench Division cannot override the authority of the Privy Council. "Are we to understand," his lordship remarked, "that a single Division of the High Court of Justice can or will set aside the laws settled by a tribunal of independent jurisdiction, hitherto enjoying universal respect for the importance and value of its decisions? To this extent the Lord Chief Justice at least is prepared to go. To stop short of it would be, he affirms, a dereliction of judicial duty."

AMELIORATION OF CRIMINAL LAW.

The nineteenth century has been prolific in discoveries and inventions; it has exhibited an amazing bound in improvements of many orders. And not least among the things to be put to its credit is the amelioration of the Criminal Code. However often repeated, some of the illustrations of this great change do not cease to be startling. Is it not marvellous to find that Lord Ellenborough, so late as the year 1810, a period within the memory of many still not very old, resisted the abrogation of the death penalty for stealing in shops to the value of five shillings? And the reasoning on which he based his protest is hardly less extraordinary. "My lords," he said, "if we suffer this bill to pass, we shall not know where to stand—we shall not know whether we are on our heads or on our feet. If you repeal the Act which inflicts the penalty of death for stealing to the value of five shillings in a shop, you will be called upon next year to repeal a law which prescribes the penalty of death for stealing five shillings in a dwelling house, there being no person therein; a law, your lordships must know, on the severity of which, and the application of it, stands the security of every poor cottager who goes out to his daily labor. He, my lords, can leave no one behind to watch his little dwelling, and preserve it from the

attacks of lawless plunderers. Confident in the protection of the laws of the land, he cheerfully pursues his daily labors, trusting that on his return he shall find all his property safe and unmolested. Repeal this law, and see the contrast: no man can trust himself for an hour out of doors without the most alarming apprehensions that on his return every vestige of his property will be swept away by the hardened robber. My lords, I think this, above all others, is a law on which so much of the security of mankind depends in its execution, that I should deem myself neglectful of my duty to the public if I failed to let the law take its course."

It is consoling that we have learned by experience that the "security of mankind" has not been greatly affected by the repeal of that barbarous law. At the present day some expedient for effectually restraining fraudulent bankrupts or dishonest directors of corporate bodies, from their nefarious practices, would be considered by most people of more importance to the security of mankind than a re-enactment of the law in question.

Townshend, in his biography of Lord Ellenborough, remarks: "So wilfully blind are the wisest men to the defects of a long established and favorite system, that Serjeant Hawkins declared that 'those only who took a superficial view of the crown law could charge it with severity,' at a time when old women could still be executed for witchcraft; and Lord Ellenborough declaimed at a period too recent, when prisoners might be pressed to death for standing mute and refusing to plead; when women might be flogged, to the outrage of female delicacy, and burnt to death in due form of law; when the horrors were not yet abrogated that formed part of the sentence of high treason; when criminals were slain in the pillory by the capricious fury of the mob; when flagrant but merciful violations of their oaths were in constant use among jurymen; when the twelve judges might be called into the open air to try a wager of battle, which time and civilization had strangely failed to abolish, and the sentence of death was pronounced with all its dread formalities by the reluctant judge, who had no intention of carrying the edict into execution."

ANGERS v. THE QUEEN INSURANCE CO.

The decision of the Court of Queen's Bench in the case of *Angers v. The Queen Insurance Co.* (ante p. 3) has been affirmed by the Judicial Committee of the Privy Council in a judgment delivered 5th July, 1878, present:—Sir James Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, the Master of the Rolls.

PER CURIAM.—In this case their Lordships do not intend to call upon the counsel for the respondents.

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the District of Montreal. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39th of the Queen, Chap. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of Canada, Nova Scotia, and New Brunswick; which entrusted the Province, or the Legislature of that Province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorise the statute which is under consideration?

It is not absolutely necessary to decide in this case how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the subsections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is; whether what has been done is authorised by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue

"for provincial, local, or municipal purposes." "The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license, before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the second section, enacts what the price of the license is to be. And reading it shortly, it amounts to this; that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent, and 1 per cent for other assurances on the premiums paid. Then the fourth section enacts that anybody who, on behalf of an assurer, shall deliver any policy or renewal or receipt without the stamp shall be liable for each contravention to a penalty of fifty dollars. The fifth section says that every assurer bound to take out a license shall be liable in each case to a penalty not exceeding fifty dollars if it has been delivered without an adhesive stamp. The sixth section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the seventh makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in equity before the Courts of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 124th: "For every license issued by a revenue officer there shall be paid to such revenue officer, over and above the duty payable therefor, a fee of one dollar by the person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon

the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a license Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the appellants, that though at first sight it might appear that this was not a license, and that this was not the

price paid for a license, yet it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for provincial purposes." The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provisions for avoiding the policy, renewal or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information,

whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

Lastly, as regards the popular use of the words, two cyclopædias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of

the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

A GREAT CHANCELLOR.

[Continued from page 404.]

While profoundly versed in all the technical learning necessary to the proper discharge of his duties, Eldon excelled especially in the law of real property. In this department he was, perhaps, more profoundly and accurately versed than any man of his time at the English bar or upon the English bench. He displayed, also, a wonderful grasp and mastery of the principles governing equitable remedies, especially the remedies of specific performance and that by way of injunctions and receivers. Indeed, the law of injunctions was largely shaped by his decisions, the instances of the relief before his time being comparatively few in number, and the principles applicable to this extraordinary remedy being far from settled. So, too, the law of copyright derived considerable impetus from his decisions, some of which have been followed as leading cases from that time to this. He also relaxed the strict rule that all parties in interest must be made parties to the litigation, and established the reasonable and salutary doctrine that a bill might be filed by several persons in behalf of themselves and all others in interest.

Viewing him side by side with the more illustrious of his predecessors, it is not difficult to distinguish isolated features in which Eldon was their inferior. Thurlow, perhaps, had more native ability of a rugged and aggressive type; Hardwicke certainly displayed more judicial originality; Somers surpassed him in accomplished learning and profound scholarship; Bacon excelled him in what may be termed the philosophy of jurisprudence; and Bacon and Hardwicke both displayed more of that creative ability which established general principles upon which future chancellors might safely build. It is only when we consider the judicial character of Eldon as an entirety that we reach a proper estimate of his true rank among the judges of the past. We see a profound and exhaustive knowledge of all the

doctrines of the Court of Chancery, as well as its practice and procedure from the earliest times; a complete mastery of all its decisions; a rare facility in the application of his immense stores of judicial learning to the case in hand; an almost intuitive faculty of determining upon first examination of a case its real bearings; a patience and thoroughness in examining every detail of fact and every authority bearing upon the case—all these, combined with a never-failing courtesy and urbanity in the discharge of his judicial duties, present a peculiar combination of judicial qualities, all of which are requisite to the character of the ideal judge, and in all of which Eldon was never surpassed.

His judicial fame may well be rested upon the sure basis of the universal estimate of the profession; for, after all, a judge's reputation is made or marred by the bar—and with the bar Eldon was supreme. Friends and foes alike conceded his wonderful attainments as a judge, and, through all the heated political controversies in which he was so often involved, his rank as the foremost English judge of his time was never questioned by the profession, to whose crucial test his judicial record of a quarter of a century was submitted and not found wanting. Campbell, enumerating his faults with no unsparing hand, and with his accustomed sneer at his personal foibles, yet does full justice to his ability as a judge. He says: "With all these defects, which I enumerate to show that I do not view him with blind admiration, and to give some value to my praise of him, I do not hesitate a moment to place him, as a judge, above all the judges of my time." And alluding to his deficiency in knowledge of the civil law, Campbell says: "Had he possessed this, he would have been the most accomplished judge who ever sat on any British tribunal."

And yet he missed, in part, the opportunities of his judicial career. He was great only as a judge, not as a statesman. His tendencies were all conservative, not creative. No English chancellor ever had greater opportunities of connecting his fame with law reforms; but they were opportunities which were all unheeded. Coming into power in a time when the growing demands of commerce and business all pointed to the necessity of reform in the procedure of

the courts, had he possessed the boldness and energy to take the lead in promoting measures of law reform, the long duration of his chancellorship and his great ascendancy in the House of Lords would have enabled him to add to his judicial reputation that of a law reformer second to no English judge of the past or present time.

It is true that during the period of his chancellorship reform bills were as yet innovations in English jurisprudence, as in English politics. But Bentham's leaven of law reform—that potential force which has never since ceased in its operation upon the ancient system—was already making itself felt. But against all improvements in the practice and procedure of the courts, as against most measure of law reform, Eldon set his face steadily like a rock. With the exception of the bill which he was reluctantly compelled to introduce for the creation of a vice-chancellor, and a bill which he proposed and carried through Parliament in 1819, to abolish the absurd relic of barbarism, trial by battle in real actions, his voice and his vote were always recorded against improvements in the law. Again and again he resisted measures looking to improvement in the Criminal Code, even opposing a bill for the abolition of capital punishment for the crime of forging negotiable securities. Measures looking toward a change in the organization and procedure of his own court uniformly met with his opposition, and that opposition generally insured their defeat.

The years 1832 and 1833 were exceedingly prolific in measures of law reform, all of which met with a sturdy opposition from the venerable ex-chancellor. Among these may be enumerated a bill prepared by the real property commissioners, headed by Lord Campbell, to abolish the tedious and expensive system of fine and recovery by a fictitious suit in the Common Pleas, as a means of aliening real property, and to substitute therefor a simple deed; a bill to abolish a large number of sinecure offices in chancery—which, to his extreme disgust, became a law; a bill to enable plaintiffs and defendants in actions at law to examine each other upon interrogatories; a bill, founded upon the report of the common-law commissioners, authorizing the judges to make rules regulating the pleadings and

practice in their courts, which resulted in the celebrated rules of Hilary term, 4 William IV.; and a bill introduced by Brougham for the creation of the system of County Courts.

We smile as we read the list of measures which he thus opposed, but here again, as upon the question of his doubts and hesitation, we may hear him in his own defence. Writing to Lord Redesdale, he epitomizes his views upon law reform in these words: "A little that is reasonable may be effectually attempted; when, if you propose all that is reasonable, nothing would be done." And he concludes this letter with these words: "Indulge the appetite for alteration in the law, which we hear so much of nowadays, and in a reign or two more we shall not have a lawyer—a well-grounded lawyer—left."

In politics Eldon was a Tory of the Tories. During the fifty-five years of his parliamentary career in the Commons and the Lords he was uniformly arrayed against all measures of innovation or reform. He clung to the old landmarks in politics as tenaciously as in law, and the political doctrines which he had espoused in early manhood were the doctrines by which he was guided to the end of his career. "He had imbibed," says Brougham, "from his youth, and in the orthodox bowers which Isis waters, the dogmas of the Tory creed in all their purity and vigor. By these dogmas he abided through his whole life with a steadfastness, and even to a sacrifice of power, which sets at defiance all attempts to question their perfect sincerity. Such as he was when he left Oxford, such he continued above sixty years after, to the close of his long and prosperous life: the enemy of all reform, the champion of the throne and the altar, and confounding every abuse that surrounded the one or grew up within the precincts of the other with the institutions themselves; alike the determined enemy of all who would either invade the institution or extirpate the abuse."

This phase of his political character was well illustrated by an incident which occurred in his old age, and which is mentioned by Twiss in his biography. In 1834, in company with the Duke of Wellington, he attended the commemoration exercises at the University of Oxford, when his grandson received his degree. The distinguished couple were of

course received with much *éclat*, and their appearance in public was everywhere greeted with rapturous applause. But of all the honors heaped upon him on this occasion, the venerable chancellor was best pleased with an incident which he afterwards related in these words: "I will tell you what charmed me very much when I left the theatre, and was trying to go to my carriage; one man in the crowd shouted out, 'There's old Eldon; cheer him, for he never rattled!' I was very much delighted, for I never did rat. I will not say I have been right through life—I may have been wrong—but I will say that I have been consistent."

But his conservatism in politics was the conservatism of conviction, and not of fear. No minister was ever bolder in public emergencies. And in a great political crisis, with a cabinet falling in pieces around him, the country in jeopardy, and the monarchy apparently tottering to its foundation, Eldon arose to the full measure of the occasion, and marshalled his forces with the coolness and daring of a veteran general. With a consummate skill in mastering men, and a still rarer facility in mastering kings, and with a courage that in political crises was simply sublime, he was the man of all others to lead a forlorn hope in an attempt to save his party or his ministry from utter annihilation. And yet he never rose to the dignity of statesmanship. He could build cabinets, but when built he could propose no great measures of policy or reform for their perpetuation. With the boldness to defend existing abuses in the law, in the Church, and in the State, he lacked the courage and inclination to originate great measures of State to perpetuate a ministry which he had created or conserved.

In no feature of his political career is his intense Toryism more apparent than in his life-long struggle against Catholic emancipation and the removal of political disabilities from members of the Romish Church. Beginning as early as 1789, for forty years the question of Catholic emancipation was a controlling question in English politics; and for forty years Eldon was the leader of the conservative forces of Church and State in opposition to the measure. At first the odds were largely in his favor, and every bill looking toward a removal

of the disabilities was defeated by immense majorities. But during the later years of the struggle he fought the fight with constantly-waning majorities, until 1829, when the measure became a law. As indicating the intensity of his prejudice in this direction, when debating the king's message, in 1829, which contained a suggestion for the removal of the disabilities, Eldon used these words: "If he had a voice that would sound to the remotest corner of the empire, he would re-echo the principle which he most firmly believed: that, if ever a Roman Catholic was permitted to form part of the legislature of this country, or to hold any of the great executive offices of the government, from that moment the sun of Great Britain would be set!"

But his hostility to the Catholics was political rather than religious. And while his leadership in opposition to Catholic emancipation gained for him a degree of reverence from the followers of the Established Church which has been accorded to few laymen, he was far from being a religious man. Byron relates that on one occasion, when the House of Lords was nearly tied on one of the debates upon the Catholic question, he was sent for in great haste to a ball, which he reluctantly left to emancipate 5,000,000 of people. He came in late, and stood just behind the woolsack. Eldon turning around saw Byron, and said to a peer who was sitting beside him on the woolsack: "Damn them! They'll have it now! By God! the vote that is just come in will give it to them."

Few men who have been trained for the bar, and whose ambition has been professional, and not political, have attained so great an ascendancy in politics, or have been so positive a power in the State for so long a period of time. For thirty years Eldon was the autocrat of the House of Lords. He ruled them in all matters of law, in all questions of Church, and in most matters of State and of politics. From his first entry into the Cabinet he became a positive element in English politics, and during the long and exciting period embracing the State trials, the Napoleonic wars, the Orders in Council, our War of 1812, the final overthrow of Napoleon, the contest for Catholic emancipation, and even down to the passage of the Reform Bill, his ascendancy in the House of Lords, and his

leadership of the conservative forces in Church and State, were unquestioned.

Indeed his entry upon public life was at a period singularly auspicious for one of his conservative tendencies, since it was at the height of reaction in England from the democratic doctrines which were elsewhere gaining ground with rapid stride. He came upon the stage in the beginning of that wonderful period which was aptly termed by Rousseau, "The coming Age of Revolutions." Our colonies had declared their independence, and had achieved it by the sword; the first mutterings were already heard of the coming storm in France, and when that storm had worn itself out and spent its fury there, it seemed more than probable, in the growing discontent, seditious meetings, and treasonable utterances everywhere apparent, that the scene of action was likely to be transferred to England. In this critical juncture Scott came to the front as the defender of the ancient landmarks. His position as attorney general placed him in the foreground in the political and State trials which followed, and in his profession and in the Cabinet, in Parliament, and everywhere, he appeared as the champion of the Constitution and the enemy of all innovation and reform. In the heat and excitement of those troublous times he addressed himself boldly to the task of crushing out the new republican philosophy. And by force of his genius, daring, and ability he thus became the recognized leader of the conservative forces of England.

His private life was unsullied. In an age whose politics were none too clean, whose morals were none too pure, and serving a king whose profligate career brought lasting disgrace upon the English monarchy, Eldon left behind him a reputation which was never assailed by his most bitter political enemies. The most charming feature of his private life was his tender devotion to his wife. The Bessy who had won his young affections, and who had deserted home for his sake, with only poverty staring them in the face, remained through life the supreme mistress of his affections. When she was no longer young or beautiful, and when her infirmities of age and peculiarities of temper had almost wholly deprived Eldon of hospitable intercourse with his friends, he still displayed the most tender and

devoted affection toward her, and never wearied of recounting her praises, or of telling the story of the heroism with which she had borne their early years of poverty. Her death, which occurred in 1831, left him quite broken down, and he seems never to have fully recovered from the shock.

His devotion to his brother William, Lord Stowell, is also worthy of note; and the warmth of their affection is manifest in all their voluminous correspondence, which covers the entire period of their public life. Lord Stowell was the elder brother, and the last years of his life were clouded by a failure of his mental faculties. But the weakening of his powers only served to render more touching the fraternal regard between the two brothers, and the elder, notwithstanding the dark cloud which was closing about him, seemed conscious to the last of the unwavering tenderness with which "Jack" watched over him.

His life after resigning the great seals in 1827 was as uneventful as that of most ex-chancellors. He seems to have looked with some confidence to a recall to the woolsack, and in his correspondence for some years afterwards there are traces of disappointment that the looked-for summons to the royal closet to again receive the seals did not come. Cabinets were made and unmade, ministers came and went, a new sovereign ascended the throne, and still the sturdy old Tory was left in his retirement, until at length he abandoned all hope of being recalled to power. He still attended the House of Lords, however, and took an active part in opposition to the Reform Bill, as well as the various measures of law reform which the disciples of Bentham were bringing forward. His last speech in the House of Lords was delivered July 25, 1834, in opposition to a bill for the construction of a railroad, which he characterized as a dangerous innovation.

He had outlived his time. His early associates in politics and at the bar were all gone. Reformers in government and the law were everywhere confronting him. Catholic emancipation had become a fact; the Reform Bill was a thing of the past; the times were out of joint. With universal change around and about him, he alone continued unchanged. Loyal to the convictions of his youth, he re-

mained the last of his school of politicians and of lawyers. Thus he awaited patiently, and even hopefully, the coming of that event which should give him release. He died January 13, 1838, at the age of eighty-six.—J. L. High, in *Southern Law Review*, Aug. Sept. 1878.

RECENT UNITED STATES DECISIONS.

(Continued from page 406.)

Devise and Legacy.—Stock in a company was bequeathed for life, with remainder to several persons, some of whom were also residuary legatees, and others were not. Pending the life-estate, the company increased its capital, giving a new share to the holder of each old one, on making a certain payment. The executor took new shares, equal to the number already held by him, and paid for them out of the estate. *Held*, as between the special and the residuary legatees, that the former was entitled to so much of the value of the new shares as grew out of the accumulated profits of the company.—*Bushee v. Freeborn*, 11 R. I. 149.

Divorce.—1. A statute of Utah Territory authorizes the granting of divorces to persons who are not, but wish to become, residents of the Territory. *Held*, that a divorce granted under this statute was of no validity outside the Territory.—*Hood v. The State*, 56 Ind. 263.

2. By statute, suits for divorce are to be heard in open court. *Held*, that such a suit could not be referred, even by consent of parties.—*Hobart v. Hobart*, 45 Iowa, 501.

3. A citizen of Massachusetts went into Maine, acquiring no domicile there, for the purpose of obtaining, and did fraudulently obtain, a divorce for a cause occurring in, but not a cause of divorce by the law of, his own State; his wife had gone to New York, and there continued. *Held*, (1) that the court in Maine had no jurisdiction; (2) that its decree, though reciting facts sufficient to give jurisdiction, was not entitled to full faith and credit in Massachusetts; (3) that the husband's domicile remaining in Massachusetts, the wife might sue for a divorce there, though not residing there herself.—*Sewall v. Sewall*, 122 Mass. 156.

Dower.—A man conveyed land with a mill on it; afterwards the mill was burnt; he died, and the mill was rebuilt; and his wife claimed

dower in the land. *Held*, that she should have it according to the value of the land when the dower should be assigned, less the amount by which its value was increased by rebuilding the mill.—*Westcott v. Campbell*, 11 R. I. 378.

Easement.—1. Land was sold, with a house on it having windows overlooking adjacent land of the grantor. *Held*, that the grantor could not obstruct the windows if they were necessary to give light and air to the house; otherwise, if sufficient light and air could be derived from other windows opened, or which might conveniently be opened, elsewhere in the house.—*Turner v. Thompson*, 58 Ga. 268.

2. Defendant dug a pit on, and removed soil from, the land of another, for his own benefit, and with the owner's license; and, by the operation of natural causes, plaintiff's adjoining land fell into the pit. *Held*, that defendant was liable, without proof of negligence, for the injury to plaintiff's land in its natural state, but not for injury to structures on it.—*Gilmore v. Driscoll*, 122 Mass. 129.

Evidence.—1. On the question of the genuineness of a signature, the opinion of a witness, based on inspection of photographic copies of the signature in dispute was *held* inadmissible.—*Eborn v. Zimpleman*, 47 Tex. 503.

2. On a criminal trial, the prosecution offered in evidence the written statement of an absent witness, not sworn to, but which a former attorney of the prisoner had consented to have read at the trial. *Held*, inadmissible against the prisoner's objection, on the ground that he was constitutionally entitled to be confronted with the witness, and that his attorney could not waive this privilege.—*Bell v. The State*, 2 Tex. Ct. App. 215.

Guaranty.—1. A guaranty was made of payment by another for goods to be sold, not founded on any present consideration passing to the guarantor, and to continue, by its terms, until written notice should be given of its termination. *Held*, that it was revoked by the death of the guarantor.—*Jordan v. Dobbins*, 122 Mass. 168.

2. Defendant made a bond to plaintiff, "to be binding one year only from date," conditioned that a third person should pay within five days after maturity any paper discounted by plaintiff for him. *Held*, that paper discounted within the year, though not maturing till after its

expiration, was within the condition.—*Davis v. Copeland*, 67 N. Y. 127.

Husband and Wife.—By an ante-nuptial settlement, property was vested in trust to the separate use of the wife during her life, free from the control of her intended or any future husband, and after her death to such persons as she should appoint, and, in default of appointment, to her husband and children, should they survive her. The wife died without making any appointment, having previously obtained a divorce for adultery of the husband. *Held*, that he took nothing under the settlement, though he survived her.—*Barclay v. Waring*, 58 Ga. 86.

Illegal Contract.—Action by payee against maker of a promissory note. *Held*, that evidence was admissible to show that the note was made solely to protect defendant's property from his creditors, and under an agreement that it should be cancelled at his request; and that these facts, if proved, were a defence.—*McCausland v. Ralston*, 12 Nev. 195.

Indictment.—An indictment for forgery of a check on the City Bank of Dallas purported to set out the tenor of the check, whereby it appeared to be drawn on the City Bank, without designation of place. *Held*, that the indictment was bad for repugnancy.—*Roberts v. The State*, 2 Tex. Ct. App. 4.

Insurance (Fire).—1. The lessees of land erected thereon a building, which, by the terms of the lease, was to belong to the lessor at the expiration of the lease, insured the building, describing it as "their building, occupied by them, situated on leased land," by a policy conditioned to be void, unless the interest of the assured as owner, assignee, factor, lessee, or otherwise, should be truly stated. *Held*, that the policy was valid.—*Fowle v. Springfield Ins. Co.*, 122 Mass. 191.

2. A policy was conditioned to be void if there should be other insurance, not mentioned in it, on the property; and contained a permission for \$6,000 other insurance. In an action on the policy, *held*, that the insured might show that he notified the insurers of, and they consented to, other insurance to the extent of \$6,000, and that \$6,000 was written in the policy by mistake.—*Greene v. Equitable F. & M. Ins. Co.*, 11 R. I., 434.

3. Partnership property was insured by policy conditioned to be void in case of any transfer

by sale or otherwise. One partner retired from the firm, and sold his interest therein to the others; after which a loss happened. *Held*, that the policy remained in force.—*Texas Ins. Co. v. Cohen*, 47 Tex. 406.

4. Goods stored in a town occupied by the United States troops during the war were insured against fire by a policy exempting the insurers from liability for damage by fire arising by any invasion, insurrection, riot, or civil commotion, or by the act of any military or usurped power. The town, being attacked by a superior force of the enemy, was abandoned by the troops, who, by the order of their commanding officer, set fire to a building containing military stores, to prevent their falling into the enemy's hands. The fire spread to the building containing the goods insured, and destroyed them. *Held*, that the insurers were not liable.—[*Etna*] *Ins. Co. v. Boon*, 95 U. S. 117; reversing s. c. 12 Blachf. 24; 40 Conn. 575.

5. The owner in fee of land caused the buildings on it to be insured by policy conditioned to be void, "if the interest of the assured be other than the entire unconditional and sole ownership of the property, or if the buildings insured stand on leased ground," unless it should be so expressed in the policy. The land was in fact let for a term of years, and this was not expressed in the policy. *Held*, no breach of the condition.—*Insurance Co. v. Haven*, 95 U. S. 242.

6. The owners of certain whiskey procured insurance on "whiskey, their own or held by them on commission, including government tax thereon for which they may be liable." They were so liable as sureties on the bond of the distiller in whose warehouse the whiskey was. *Held*, that this interest was insurable, and covered by the policy; and judgment having been recovered against the assured in a suit on the bond, which the insurers had been requested, and had declined, to defend, *held*, that the insurers were liable for the amount of that judgment.—[*Germania*] *Ins. Co. v. Thompson*, 95 U. S. 547.

Insurance (Life).—1. By a policy of insurance the statements in the application were made warranties. These statements were written by the medical examiner of the insurers, to whom the assured told the truth about his health, but

by whose advice some of the questions were untruly answered. *Held*, that the physician was not the insurer's agent to fill out the application, and that they were not bound by his acts.—*Flynn v. Equitable L. Assurance Society*, 67 N. Y. 500.

2. An assignment of a policy of life insurance to one who had no interest in the life of the assured, *held*, valid.—*Clark v. Allen*, 11 R. I. 439.

Insurance (Marine).—A vessel was insured at and from Honolulu, via Baker's Island, to a port of discharge in the United States, "the risk to be suspended while the vessel is at Baker's Island loading." *Held*, that extrinsic evidence was admissible to show that Baker's Island was a dangerous anchorage, with no harbor, visited only for the purpose of loading guano; and that, in view of these facts, the effect of the policy was to suspend the risk while the vessel was at the island, whether actually engaged in the process of loading or not.—*Reed v. Merchants' Ins. Co.*, 95 U. S. 23.

Interest.—An agent had in his custody for many years, among other property of his principal, a bond made by himself to the principal. He computed the interest, and compounded it every year, and charged the amount against himself on his books; and, at the termination of his agency, stated an account with his principal, including the amount so due on the bond with compound interest. He had made payments from time to time on the bond, which would have more than satisfied it if simple interest only had been reckoned on it. In an action on the account stated, *held*, that no promise to pay compound interest was implied by the statement, or, if any was implied, that it was without consideration.—*Young v. Hill*, 67 N. Y. 162.

Judge.—A prisoner convicted and sentenced by a judge who had been regularly appointed, and who had continued to act as such publicly, no other person having been appointed in his stead, sought to be discharged by *habeas corpus*, on the ground that the judge was disqualified under the Constitution, by reason of having taken a seat in the legislature. *Held*, that he was at any rate a judge *de facto*, and that his title could not be inquired into on this process.—*Shoshani's Case*, 122 Mass. 445; *Ex parte Call*, 2 Tex. Ct. App. 497, a. p.

Judgment.—After a general verdict of guilty on an indictment containing several counts for distinct offences, the prisoner was sentenced on some of the counts to imprisonment, and was imprisoned, and the case was not continued. *Held*, that he could not be brought up at another term, and sentenced on another count, though the first sentence was erroneous.—*Commonwealth v. Foster*, 122 Mass. 317.

Jury.—The judge presiding at a criminal trial set aside a juror as unfit, of his own motion, without challenge by either party. *Held*, proper.—*State v. Lartigue*, 29 La. Ann. 642.

Larceny.—1. The prisoner sold an impounded horse, claiming to own it, but in fact knowing that he had no right to it; and the purchaser took it away from the pound. *Held*, that the prisoner was guilty of larceny.—*State v. Hunt*, 45 Iowa, 673.

2. The prisoners, by fraudulent devices, and with felonious intent to convert the prosecutor's money to their own use, induced him to deliver it temporarily, for a specific purpose, to one of them, and then, without his consent, converted it to their own use. *Held*, that they were guilty of larceny.—*Loomis v. People*, 67 N. Y. 322.

Lease.—See *Insurance (Fire)*, 1, 5, *Tax*, 2.

Legacy.—See *Devise and Legacy*.

Limitations, Statute of.—An indorsement of part payment on a note was written, but not signed, by the maker; it being orally agreed between him and the holder that such indorsement should be deemed a payment; but no money or other valuable consideration was actually paid. *Held*, that such indorsement would not take the note out of the Statute of Limitations.—*Blanchard v. Blanchard*, 122 Mass. 558.

Lost Property.—Plaintiff bought an old safe, and left it with defendant to sell, permitting him to use it in the mean time. On examining it, defendant found a roll of bank-bills hidden between the outer casing and the lining. *Held*, that, as against plaintiff, he had a right to keep the bills.—*Durfee v. Jones*, 11 R. I. 588.

Master and Servant.—1. A servant of a railway company, employed to work on its track, was run over and injured by a locomotive, through the negligence of the engineer. *Held*, that the company was liable; but that evidence that the servant had a family, whom he could not support by his labor since his injury, was inadmis-

sible on the question of damages.—*Pittsburg, Ft. Wayne, & Chicago Ry. Co. v. Powers*, 74 Ill. 341.

2. A servant, hired for a year to work in the lumber trade, embarked in the same trade on his own account. *Held*, that his master might discharge him within the year, though he gave his whole time and attention to the master's business.—*Dieringer v. Meyer*, 42 Wis. 311.

Mortgage.—A power of sale in a mortgage was executed after the death of the mortgagor, and a surplus remained, after paying the debt, in the hands of the mortgagee. *Held*, that the administrator of the mortgagor could maintain no action to recover it.—*Chaffes v. Franklin*, 11 R. I. 578.

Municipal Corporation.—1. A city owned a wharf, and was entitled to take tolls for its use. A vessel lying at the wharf was injured by striking a stake under water, which could not be seen at low tide. *Held*, that the city was liable, and none the less so because another corporation was required by statute to remove obstructions from the stream, or because the United States occasionally dredged the stream, or because the city received no tolls from the owners of the vessel.—*Petersburg v. Applegarth*, 28 Gratt. 321.

2. A child attending a public school in a school-house provided by a city, under the duty imposed on it by general laws, cannot maintain an action against the city for an injury suffered by reason of the unsafe condition of a staircase in the school-house, over which he is passing.—*Hill v. Boston*, 122 Mass. 344. [See this case for a very full discussion of the liability of cities and towns to a private action for neglect of public duty.] And see *Alarich v. Tripp*, 11 R. I. 141, *contra*.

3. A city, by changing the grade of a highway, as it had power by statute to do, caused surface water to flow into the plaintiff's cellar. *Held*, that the city was liable to the plaintiff.—*Inman v. Tripp*, 11 R. I. 520.

4. The Constitution of Missouri forbids municipal corporations to become stockholders in, or to loan their credit to, any company, unless two-thirds of the qualified voters of such municipal corporation, at a regular or special election to be held therein, shall assent thereto. *Held*, that the assent of two-thirds of the voters actually voting at the election was sufficient.—*Cass County v. Johnston*, 95 U. S. 380.

Negligence.—The steerage of a ship at quarantine was fumigated, after excluding passengers, by order of the health officers, with a poisonous substance, put in open vessels; afterwards, the steward sent the passengers back, but neglected to remove one of the vessels, as he had been directed by the health officer to do, though he removed the others; and the child of a passenger drank from the vessel, fell sick, and died. *Held*, that the master of the ship was liable.—*Kennedy v. Ryall*, 67 N. Y. 379.

New Trial.—A. and B. were indicted and tried jointly. A. was acquitted; and B. was convicted, and moved for a new trial, on the ground that A. could give evidence for him. But as it did not appear that a severance was asked for before trial, or an acquittal of A. during the progress of the trial, to enable him to testify, nor that B. was ignorant till after trial, of the fact that A. could give evidence, a new trial was refused.—*State v. Woodworth*, 28 La. Ann. 89.

Notary.—A notary public certified an acknowledgment on documents which he knew to be forged. *Held*, that the sureties on his official bond were liable for damages caused by his act.—*Rochereau v. Jones*, 29 La. Ann. 82.

Nuisance.—Action for suffering water to collect on defendant's land, whence it overflowed on and injured plaintiff's land. *Held*, that defendant was liable, though he had done all in his power to carry the water off safely.—*Jutte v. Hughes*, 67 N. Y. 267.

Officer.—Defendant, a sheriff, having attached goods as the goods of A., at plaintiff's suit, afterwards released them, on B.'s claiming them as his, though plaintiff offered to indemnify him for holding them. *Held*, that defendant was not liable at all events; but that the burden was on him to show that the goods did not belong to A.—*Wadsworth v. Walliker*, 45 Iowa, 395.

Power.—A will appointed three executors, with power to sell land; and land of the testator was sold and conveyed, with the consent of all, but by the deed of one alone. *Held*, that the power was defectively executed, but that equity would aid it.—*Giddings v. Butler*, 47 Tex. 535. See *Mills v. Mills*, 28 Gratt. 442.

Trade-mark.—The name "Bethesda," applied to a mineral spring, and used as a mark on barrels in which water from the spring is sold, *held*, entitled to protection as a trade-mark.—*Dunbar v. Glenn*, 42 Wis. 118.

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ENGLISH JUDICIAL CIRCUITS.

Those who have lived in long and familiar contact with a system seldom feel disposed to thrust it aside, whatever may be its patent disadvantages and defects. In legal reforms the judges are often the last to summon energy to press for a change which seems desirable to outsiders, and even when one member of the bench assumes the task of urging reforms, his brethren are apt to treat his efforts coldly. The report of the English judges on the subject of Circuits seems to afford a fresh illustration of this. A committee of six members of the bench—Lord Chief Justice Coleridge, Lord Justice Brett, Mr. Justice Lush, Mr. Justice Manisty, Mr. Justice Lindley, and Baron Huddleston—was recently appointed to consider, in conjunction with the Attorney and the Solicitor General, the working of the present Circuit system. It answered the questions submitted to it in April, and a Parliamentary Return has now been issued containing the answers of the judges and some comments by the Home Secretary upon them. Five questions had been propounded by Lord Cairns and Mr. Cross, to which they invited replies from the eminent personages we have named. They desired to know what, on the assumption that there are to be four gaol deliveries yearly, are the most convenient seasons for holding them; how Quarter Sessions can be best made to work in with the Assizes; whether it is desirable to enlarge the jurisdiction of Quarter Sessions; how the system of grouping counties for Assizes has worked in practice; whether, by the total or partial abolition of commission days, by the despatch of a single judge to certain Circuits, or in any other way, judicial time on Circuits can be economized; and, lastly, how the judicial needs of Leeds, Liverpool, Manchester, and Surrey for the trial of *Nisi Prius* cases can be met.

In reply, the Committee, who must be taken to represent pretty fairly the mind of the English Bench, agree in recommending very little,

and seek, by expressing dissent and doubt on several of the changes contemplated or adopted, to check the ardor of the Lord Chancellor for reform. If there are to be four annual circuits, the Committee think that there should be a winter circuit and a summer circuit for the trial both of civil and of criminal business, and spring and autumn circuits for criminal trials only. But the Committee all agree in disputing the assumption that four gaol deliveries are necessary. The reasoning by which they support their views, according to the *Times* summary, is peculiar. "They cannot deny that prisoners are sometimes at present detained too long in gaol, but they assert that it is a question altogether of relative inconvenience. Prisoners, the judges declare, are generally guilty. Even of those who are acquitted only a minority are innocent. Of the very few innocent prisoners, an inconsiderable minority are kept in gaol unreasonably long. Such grievances as are suffered might be rendered infinitesimal by a more liberal use of the power of setting persons accused of minor offences at liberty on bail or even on their own recognizances. The Committee deprecates with almost unjudicial vehemence the transfer from guilty shoulders of what it considers the present very slight and avoidable inconvenience to the undoubtedly innocent judges, barristers, solicitors, sheriffs, grand and petty jurors, prosecutors, and witnesses. Are all these respectable and, many of them, prosperous gentlemen, who, the report indignantly puts it, 'as a rule, are much better than even the innocent prisoners in worth and character,' to be kept loitering about a court or rushing about the country every three months in order that an innocent girl may not be held for five months grinding her heart out in gaol on suspicion of a larceny she is proved after a ten minutes' trial never to have committed?" On this point, however, the report is not likely to have much weight. Mr. Cross expresses himself as confident that no Minister on either side of the House "would venture to propose such a retrograde measure as the abolition of the fourth Assize which has now been provided for by Parliament."

On the question of grouping counties, in order to save judicial time, the Committee entreat, that "at whatever cost of inconvenience to the judges," the system be abandoned.

It is condemned by them as imposing an unfair burden of duty on the sheriffs and grand jurors of the central county in a group in which the Assizes are practically sure to be held. It is alleged to be cruel to the petty jurymen, dragged scores of miles from their homes, and detained throughout a lengthened Assize till the whole list is gone through. It is unjust to prisoners themselves, who might afford to bring witnesses from a dozen miles away, but not from seventy or eighty, and who, if acquitted, find themselves "turned loose on the world far from their own home and from any one who knows them."

On the subject of Assizes and Quarter Sessions, the judges recommend a system somewhat like that which was introduced in this Province some years ago—that is, disposing of trifling charges at intermediate Sessions, while graver offences are reserved for the Queen's Bench. The Committee are unanimous against any radical enlargement of the jurisdiction, but, as a concession, are not absolutely opposed to its extension to the trial of simple burglaries in which no personal violence has been used. Five of the members recommend that the Judges of Assize should at every Circuit, as now on the Winter Commission, be exempted from the obligation to deliver the gaols of any but prisoners committed for trial at the Assizes. Lord Justice Brett differs from the rest on this point. All would probably agree with him in desiring that "the Assizes and the Sessions should be treated as one judicial machine for trying prisoners." The Committee generally, however, hold that this can be best effected by dividing the gaol inmates individually between the Assizes and the Quarter Sessions. Lord Justice Brett's view is that, without special injustice or inconvenience, prisoners charged with serious offences may be left in gaol for some three months, but that other prisoners should be convicted or acquitted within eight weeks at furthest. By the plan he proposes Sessions would be held in the intervals between the several Assizes, and persons accused of Quarter Sessions crimes would be triable either at Sessions or at Assizes, whichever might be held first. Besides the speedier clearance of the gaols, an incidental benefit, the Lord Justice believes, would result from the greater uniformity of punishment likely to be attained

by submitting occasionally offences commonly tried by the permanent and unpaid local magistracy to the trained and various minds of the Judges of the Superior Courts.

We referred not long ago to Mr. Justice Hawkins' fondness for seeing a sheriff in uniform. His brethren, apparently, are not less careful to abate no jot of official pomp. It had been suggested by Sir James Stephen that what are known as "commission days" might well be added to the ordinary time at the disposal of the judges holding circuits; but the committee warmly protest against the abolition of the pomp and ceremony usual on these occasions.

CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence has of late years assumed great importance in our courts. We have thought it might be useful to collect and review the principal cases on this subject in our Court of Appeals, and occasionally accompany them with some remarks.

Button v. Hudson River Railroad Co., 18 N. Y. 248.—In this case the intestate was found lying dead on the defendants' track, having been run over by their cars. How he came there was not shown. It was held, that although the burden is on the plaintiff to show affirmatively that he was guiltless of any negligence proximately contributing to the injury, yet direct evidence to disprove such negligence is not required in the first instance; but where there is conflicting evidence, the preponderance must be with the plaintiff to enable him to recover. In this case, as the death was the combined result of the presence of the deceased on the track, and the passing of the cars over his body, it was held that the jury should have been instructed that "the only question for them to decide was, whether by the exercise of reasonable care and prudence, after the deceased was discovered, the driver might have saved his life." The judgment was reversed, for the reason that the judge charged the jury that, in order to exempt the defendant, the negligence of the defendant must *directly* have contributed to the injury.

Remarks.—In the syllabus, and in the note at the close of the report of this case, of the discussion among the judges as to what ground

they should put the reversal on, the idea is put forward that negligence on the part of the plaintiff is never *presumed*. This seems to be a mere form of words. The proposition is probably true, but it is of comparatively little importance, for the burden of establishing an absence of contributory negligence is still on the plaintiff, and it must appear from all the evidence at the close of the case. It is simply a matter regarding the right to ask for a nonsuit. As Judge Strong here says, "it would be enough, if the proof introduced of the negligence of the defendants and the circumstances of the injury, *prima facie* established that the injury was occasioned by the negligence of the defendants, as such evidence would exclude the idea of a want of due care by the intestate aiding the result."

Stevens v. Onwego, etc., Co. id. 422.—The plaintiff approached the crossing without looking to see if there was a train within sight, and attempting to cross, was injured by an engine. The court say: "Ordinary regard for his own safety would have prompted him, as he approached the crossing, to see, as he might well have done, whether the cars were not also approaching. It is obvious that a single look would have saved him from the disaster with which he met. . . . That the plaintiff should have entirely omitted to look was the extreme of carelessness. Such carelessness is entirely inconsistent with a right to recover damages founded upon the negligence of the defendants. The plaintiff is himself the author of his own injury. Nonsuit was sustained."

Remarks.—This was not unanimous. Three judges dissented, holding "that the object of the statute requiring the ringing of the bell or sounding the whistle was to put persons, negligently approaching a crossing, upon their guard; and the question whether the negligence of the plaintiff was such, that, if the proper signals had been given, he would still have been injured, was one which should have been submitted to the jury." That is to say, whether, under all the circumstances, the deceased was negligent, was a question for the jury.

Johnson v. Hudson River Railroad Co., 20 N. Y. 65.—The deceased, a sober cartman, was found dead upon the track, under the circumstances authorizing the inference that he had fastened

his horse, and was groping in the dark to find a safe passage for his team, when struck by defendants' car. There was an open sewer obstructing the street, which the deceased had to cross to reach his home, and the passage left was narrow and difficult. A horse car of the defendants was proceeding, on a dark evening, without bells or light, on the track in question.

Held, that the tendency of the defendant's conduct was so dangerous, as in the absence of any other evidence than the presumption that the deceased had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit. The court say: "It is not a law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the disposition of the affair as it stands upon the undisputed facts. Thus if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault, that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveller, it would be reasonable to require the party seeking damages for an injury to give general evidence that he was travelling with ordinary moderation and care." "The absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration." And the negligence of the plaintiff, "as well as the absence of fault, may be inferred from the circumstances." "The true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered, to show the nature or cause of the accident, or in any

other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune on himself. No more certain rule can be laid down."

Remarks.—This is a departure from the *Button* case, *supra*, although the circumstances are somewhat similar. Of that case the court say, "we were not sufficiently agreed to make it a lucid precedent." In this case, as in that, the judge charged the jury that the contributory negligence, to exonerate the defendants, must *directly* have aided the result. This charge was here sustained, the court remarking, "as there was no conceivable negligence which could be imputed to the deceased, which would operate remotely, or collaterally, or otherwise than directly, I am of opinion that the jury were not misled;" and in this all the judges but Strong concurred. They endeavor to let down the *Button* case softly, by saying, "the attention of the judge was not specially drawn to the expression, as in the case of *Button*." In this case, too, we see an indorsement of the ideas of the three dissenting judges in the *Steves* case, *supra*, namely, that in some cases the defendant's negligence may be such as to cause the plaintiff's negligence, in which cases the latter is excusable.

Wilds v. The Hudson River Railroad Co., 24 N. Y. 430.—The plaintiff's intestate was killed by defendant's train, while crossing their track with a team. There was evidence that a flagman was waving a flag at the crossing, and that deceased, who was a milkman and familiar with the crossing, was warned by shouts of bystanders, and by one trying to catch and hold his horses, but that he whipped up his horses, which were already going rapidly, and drove on the track, knocking down the flagman. It also appeared by looking, Wilds could have seen the train 650 feet away. A judgment for the plaintiff was set aside.

Remarks.—The opinion was pronounced by Judge Gould, who took the ground that there was ample proof of the negligence of the deceased, and no sufficient proof that the defendant was negligent. Two judges concurred in the result; two others were also for reversal, but on the ground that the deceased was negligent; and one judge dissented, on the ground that although there was no contradiction as to the conduct of the intestate in approaching the crossing, yet the question of his negligence was for the jury. This judge observes, "A question of negligence presents the question, what a person ought or ought not to have done under the circumstances of the case;" and this he says is a question of fact and not of law. Judge Gould says that this "is a stronger case than *Steves*' case, which remains the law of this State."

This case came up again two years later, in 29 N. Y. 315. Judge Hogeboom, on evidence not very materially differing from that on the former trial, feeling himself constrained by the opinion of the Court of Appeals, granted a nonsuit, and this case was sustained by an unanimous court, except that Judge Hogeboom dissenting, observed that a more careful review of the former opinion had satisfied him that he was wrong in his construction of it. He says: "I am inclined to think it more consistent with the theory upon which the right of trial by jury rests, and safer for the general interests of parties, to resolve such doubts in favor of the submission of such questions to the jury than the withdrawal of them from their consideration." In the prevailing opinion, Judge Denio observes, "the uncontradicted evidence was such as not to present anything for the jury to deliberate upon," and the *Steves* case is again approved.

Hance v. Cayuga & Susquehanna Railroad Company, 26 N. Y. 428.—The plaintiff's cattle escaped from his lot, and straying upon the defendants' tracks, in consequence of the defendants' negligence in not clearing them from snow, were killed. *Held*, that the plaintiff's negligence contributed, and a judgment for him was set aside. (See, also, *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349. But this is now changed by statute, and negligence cannot now be imputed to a person simply from the fact that his beasts have escaped from a well-fenced

field on to a railroad track. *Spinner v. N. Y. Cent., etc., Co.*, 67 N. Y. 153.)

Haley v. Earle, 30 N. Y. 208.—The plaintiff's barge, while in tow, and without a helmsman, collided with defendant's steamboat. The judge left it to the jury to say whether the absence of the helmsman contributed to the injury; they found a verdict for the plaintiff; and this was affirmed.

Mulhado v. Brooklyn City R. R. Co., 30 N. Y. 370.—The plaintiff, a passenger upon a city railroad car, asked the driver, who had stopped, to keep his brake on, and proceeded to alight from the front platform; before the plaintiff had got off, the driver let go the brake, putting the car in motion, and precipitating the plaintiff into the street and injuring him. Plaintiff had a verdict. *Held*, that the plaintiff was not chargeable with any fault in preferring his request to the driver rather than the conductor, nor in getting off at the front rather than the rear, as he had got on at the front without objection, and it did not appear that there was any notice to passengers that they must not get off in front.

Buel v. New York Central R. R. Co., 31 N. Y. 314.—The plaintiff, a passenger on defendants' car, which was standing still, seeing a train approaching on the same track, and men jumping from the cars to avoid the impending danger, left his seat and rushed to the door to escape. Just as he reached the platform, the collision occurred and threw him off and injured him. Other passengers who did not see the danger, and remained seated, were not hurt. A verdict for the plaintiff was sustained. The court remark: "Seeing the approaching train, and that a collision with its consequences was inevitable, it was not the part of prudence to have deliberately kept his seat without an effort at self-preservation. There is no man, under the circumstances, retaining his senses, and acting with ordinary prudence, who would not have exerted himself in some way to escape the great peril." "At all events, it was for the jury, and not the court, to say whether the plaintiff's conduct, in view of the circumstances was rash or imprudent, or amounted to negligence."

Remarks.—This seems to have been a case of uncontradicted evidence, and yet the court say the question of contributory negligence is for

the jury. In view of the preceding cases, the inquiry becomes interesting, what would the court have done had the verdict been the other way?

Brown v. N. Y. Cent. R. R. Co., 32 N. Y. 597.—The plaintiff, who was a passenger on a stage coach, was injured by a "running switch." There was no pretence that she herself was negligent, but it was claimed that the driver was; and although Judge Davis, who delivered the opinion, thought his negligence not imputable to her, yet as the rest of the court thought otherwise, it examined that question. As the driver approached the track, seeing a train coming, he stopped; when it had passed he started on, but seeing a detached car approaching, stopped again; when this had passed, seeing nothing more, he started again, but when on the track he saw another detached car coming within two rods of him, and he concluded that the safest way to escape was to pass the track. The court held that the question was for the jury, because it was whether under all the circumstances the driver did not exercise his best faculties and proper care. A verdict for plaintiff was affirmed, two judges dissenting.

Remarks.—This, it will be perceived, was a case where, if the driver was negligent at all, his negligence was induced by the defendant's negligence in executing the running-switch. As the judge observes: "The signals of the train had told him where the danger was, but gave no warning of unsignaled danger to follow." As to the doctrine of imputed negligence, we shall speak further on.

Beisiegel v. N. Y. Cent. R. R. Co. 34 N. Y. 622.—The plaintiff was attempting to cross a trackway of five tracks in the city; a long train was approaching, and he waited for it; he then started on, and, looking to the east as far as he could, saw that the track was clear; he then turned his head west, and, while looking west, was struck by an engine backing down from the east; there was no flagman, bell or whistle; some freight cars on the track obstructed his view, or he would have seen the engine in time to avoid it. The plaintiff was nonsuited. This was reversed, the court holding that, under the circumstances—the peculiar position of the plaintiff, his proximity to the track, the few moments it would take to clear it, his

obstructed vision, the noise and confusion, the absence of signals and the unusual speed—it was a proper question for the jury whether plaintiff was negligent. The court also lay down the doctrine that “a defendant cannot impute a want of vigilance to one injured by his act or negligence, if that very want of vigilance was the consequence of an omission of duty on the part of the defendant;” and that, as one judge says, the plaintiff “was not bound to be on the lookout for danger when assured by the company that the crossing was safe;” or as another expresses it, “the omission of a railroad company to sound an alarm when approaching a crossing, especially when the view is obstructed by intermediate objects, is some excuse for the inattention of a way-traveller to the danger of an approaching train.”

Remarks.—The cases of *Stevens* and *Wilds* were distinguished on the ground that there were signals in those cases. Judge Porter very cogently remarked: “The non-suit seems to have been granted on the theory that a citizen, who crosses a railway track at its intersection with a highway, is an absolute insurer of his own safety against the criminal negligence of a wrong-doer. It was sustained at the General Term, on the equally untenable theory that the plaintiff, who looked in each direction before crossing, and saw no engine approaching, was guilty of culpable negligence in not continuing to look both ways simultaneously!”—*Albany Law Journal*.

WHO ARE FELLOW-SERVANTS.

COURT OF APPEAL, JUNE 3, 1878.

CHARLES V. TAYLOR, WALKER & Co., 38 L. T. Rep. (N. S.) 773.

Where two persons are working for the same master for a common general object, there is a common employment, which exempts the master from liability to one of them for injury caused by the negligence of the other, although the work on which they are engaged is not the same.

The plaintiff was hired by a man who had contracted to unload a coal barge at defendants' brewery, to assist in unloading; he was paid by the defendants, and defendants alone could discharge him. While employed in carrying coal he was injured through the negligence of defendants' servants, who were moving barrels in the brewery.

Held (affirming the decision of Lopes, J.), that there was evidence to justify a finding that plaintiff was defendants' servant, that plaintiff was engaged in a common employment with the persons who caused the injury, and therefore he could not recover.

Appeal by the plaintiff from the judgment of Lopes, J.

The action was brought to recover damages for injury caused to the plaintiff by the negligence of the servants of the defendants. The defendants were owners of a brewery situated on a wharf by the side of a river, and the plaintiff was employed at the wharf in unloading a barge containing coals which were intended to be used in the defendants' brewery.

The plaintiff was engaged by a man named Ansell, who was what is called a “lumper,” and who had contracted with the defendants to unload the barge and carry the coal on to the defendants' premises for 1s 9d. a ton, Ansell finding the necessary labor. He engaged the plaintiff and some other men, and the money paid by the defendants was divided among those who were employed. Ansell, who was called at the trial, said in his evidence, “I hired Charles” (the plaintiff), “and could have hired any one I liked;” he also said, “I was servant to the defendants; I could not discharge Charles without asking the defendants;” and when asked, “Who would discharge Charles?” he answered, “I could not; they would look to me as foreman; I could not discharge him.” The plaintiff was carrying a sack of coal, and was ascending some stone steps underneath a heavy flap which was kept in its place by a chain; some of the defendants' men were engaged above in moving barrels of beer, and one of the barrels slipped, through the negligence of those who were moving it, and fell against the chain which kept up the flap, and broke it, in consequence of which the flap came down upon the plaintiff and seriously injured him. The damages to be paid, if the defendants were liable, were fixed by agreement, and the case was reserved for the consideration of Lopes, J., with power to draw inferences of fact.

The learned judge said the case could be distinguished from *Abraham v. Reynolds*, 5 H. & N. 143, and was more like *Wiggett v. Fox*, 11 Ex. 832; 25 L. J. 188, Ex., that the plaintiff could not be said to be servant to Ansell, that the case was undistinguishable from *Morgan v. The*

Vale of Neath Railway Co., 13 L. T. Rep. (N. S.) 564; L. R., 1 Q. B. 149; 35 L. J. 23, Q. B., and gave judgment for the defendants, on the ground that the injury to the plaintiff was caused by the negligence of his fellow-servants acting in a common employment with him.

The plaintiff appealed.

Bucknill, for the plaintiff. In the first place, the plaintiff was not in the service of the defendants. *Swainson v. The North-Eastern Railway Co.*, 38 L. T. Rep. (N. S.) 201. He was in the service of Ansell, who was an independent contractor, and therefore the defendants are liable to him for the negligence of their servants. Ansell's position was something like that of a stevedore, and *Murray v. Currie*, 23 L. T. Rep. (N. S.) 557; L. R., 6 C. P. 24; 40 L. J. 26, C. P., shows that a stevedore is an independent contractor. The defendants did not pay the plaintiff, and were not liable to him for wages; they were only liable to pay Ansell. If the plaintiff had been guilty of negligence the defendants could not have been made liable for his negligence; only Ansell or the plaintiff himself would have been liable. Secondly, even if the plaintiff was the servant of the defendants, there was no common employment as between him and the men who were moving the barrels, so as to exempt the defendants from liability to him for their negligence. The case which appears at first sight to be most against the plaintiff on this point is *Lowell v. Howell*, 34 L. T. Rep. (N. S.) 183; L. R., 1 C. P. Div. 161; 45 L. J. 387, C. P.; but that case really differs from the present, for there the plaintiff had himself undertaken the particular risk by going out through a particular door, which made the case like *Degg v. The Midland Railway Co.*, 1 H. & N. 773; 26 L. J. 171, Ex. For the same reason *Woodley v. The Metropolitan District Railway Co.*, 36 L. T. Rep. (N. S.) 419; L. R., 2 Ex. Div. 384; 46 L. J. 521, Ex., is not an authority against the plaintiff. No positive general rule governing all cases of this kind can be laid down, but each case must depend on its own particular circumstances. *Rourke v. The Whitemoss Colliery Co.*, 35 L. T. Rep. (N. S.) 160; L. R. 1 C. P. Div. 556; 46 L. J. 283, C. P.; affirmed in the Court of Appeal, 36 L. T. Rep. (N. S.) 49; L. R., 2 C. P. Div. 205; 46 L. J. 285, C. P., is a stronger case against common employment than this; and see *Indermaur v.*

Dames, 14 L. T. Rep. (N. S.) 484; L. R. 1 C. P. 274; 35 L. J. 184, C. P.; affirmed, 16 L. T. Rep. (N. S.) 293; L. R., 2 C. P. 311; 36 L. J. 181, C. P. *Morgan v. The Vale of Neath Railway Co.*, 5 B. & S. 570; 33 L. J. 260, Q. B.; affirmed 13 L. T. Rep. (N. S.) 564; L. R., 1 Q. B. 149; 35 L. J. 23, Q. B., is distinguishable, because there the plaintiff was a carpenter in the general employment of the railway company, and could have been sent to work anywhere. The plaintiff here was engaged in entirely distinct and separate work from the persons who caused the injury, and this prevents the rule as to common employment from applying. See the judgments of Lord Chelmsford in *McNorton v. The Caledonian Railway Co.*, 28 L. T. Rep. (N. S.) 376, cited in Smith's Master and Servant 205 (3rd ed.) and *Bartonskill Coal Co. v. McGuire*, 3 Macqueen, 307. *Abraham v. Reynolds*, 5 H. & N. 143, is an authority for the plaintiff; and *Wiggett v. Fox*, 11 Ex. 832; 25 L. J. 188, Ex., which is relied on for the defendants, is questioned by Cockburn, C.J., in *Rourke v. The Whitemoss Colliery Co.*, L. R., 2 C. P. Div. 207, 208. [Thesiger, L. J., referred to *Wilson v. Merry*, 19 L. T. Rep. (N. S.) 30; L. R., 1 Sc. & Div. App. 326.] In *Smith v. Steele*, 32 L. T. Rep. (N. S.) 195; L. R., 10 Q. B. 125; 44 L. J. 60, Q. B., the executrix of a pilot who had been employed by shipowners, where the employment of a pilot was compulsory, was held entitled to recover against the owners for the negligence of their servants which caused the testator's death. Thirdly, assuming that the plaintiff was the defendants' servant, and that there was a common employment, the defendants are liable, for it does not appear that the danger was known to the plaintiff. See the judgment of Lord Chelmsford in *Bartonskill Coal Co. v. McGuire*, 3 Macqueen, 308.

Day, Q. C., and *Erskine Pollock*, for the defendants.

BARR, L. J. I cannot help saying that Mr. Bucknill has argued this case very ably, and everything has been said that could be said on behalf of the plaintiff; but, notwithstanding, I am of opinion that we must support the judgment of Lopes, J. The first point is, was the plaintiff a servant of the defendants at all? The evidence was left to Lopes, J., by agreement to draw inferences and arrive at a conclusion. He has come to the conclusion that

the plaintiff was the servant of the defendants, and the question is not, should we have come to the same conclusion ourselves; but was the learned judge wrong in the conclusion at which he arrived in such a way that we ought to set aside his finding as being against the weight of evidence? Among the witnesses called at the trial was a man named Ansell; he was what is called a "lumper," and the defendants employed him, the terms of the employment being that he should get the barge discharged at 1s 9d. a ton, and obtained men to do the work, he doing part of it himself; the men were paid out of the 1s. 9d. a ton. Ansell went on to state that he did the work and selected the men; that they used to work under him as men work under a foreman; he worked as if he were a foreman; he also said that he could not dismiss the men himself. I think, therefore, that Lopes, J., was justified in saying that Ansell was not a master, but, as he himself said, a foreman. If this is true, the plaintiff was the servant of the defendants, and he was injured by the negligent act of another person, and that other person was a servant of the defendants; therefore both were servants. Then it is said that they were not fellow-servants within the rule which has been established, so as to exempt the defendants from liability. Many cases and views of different judges have been cited to show the principle on which, though a master is liable to all other persons in the world for the negligence of his servant, he is not liable to a servant of his own who was engaged in a common employment with the servant who was guilty of negligence. It would be contrary to our duty to say anything as to the policy of the law; that question is not one for our consideration; we have to find out the principle, and apply it to the circumstances of the case before us. I have heard and read many views which have been expressed on the subject; they are not all the same, but it is not material to consider here which is absolutely correct, for they all come to this in substance, where the negligence of one servant of the defendant has caused injury to another servant of the defendant, in general the defendant is not liable; the rule absolves the master where a man is injured by the act of a servant, if the plaintiff is also a servant; that is, if they are both servants of the same

master, and the service of each brings him to the same place, and at the same time with the other, and one is negligently injured by the other fellow-servant, then the master is absolved from liability. Here the service of the plaintiff would oblige him to work at the same place and at the same time as the servants who were engaged in moving the casks, and here there is more than that, for both were working for the brewery. I put it on this, that both were servants of the same master, and were at work at the same place and at the same time. This eliminates "at the same moment," and "for the same object," for I do not think that is necessary. Lord Cairns, in *Wilson v. Merry*, *ubi sup.*, meant that, and not that the servants need be of the same class, or working for the same result, but that if they were engaged in one general employment the master was not liable. Therefore, I think there was evidence on which Lopes, J., rightly found that the plaintiff and the person whose negligence caused the injury to him were working for the same master in a common employment, so as to exempt the defendants from liability.

CORROX, L. J. I also think that the judgment is right. The plaintiff was injured by negligence, and the first point which it is necessary to make out on behalf of the defendants in order to bring the case within the exception to the general rule is to show that he was the servant of the defendants. I had some doubt on that point at one time, but we are not here to form an independent conclusion on the question. The judge found on the evidence that the plaintiff was the defendants' servant; he saw the witnesses, and had an opportunity of observing the mode in which they gave their evidence. I do not know how I should find if I had to decide the question, but I think we are not justified in overruling the finding of the learned judge. Therefore we must start on the footing that the plaintiff was in the service of the defendants. Then it is said that, to exempt the defendants from liability, not only must he have been their servant, but he must have been in a common employment with the person through whose negligence he was injured. In the present case it is clear there was a common employment. Many cases may be put where the master might be liable, as where he carries on

two distinct businesses, and a person employed in one of them is injured by the negligence of a person employed in the other. It is not necessary to answer that suggestion, for this is a different case; here the plaintiff was clearly acting for the brewery, and that makes it a case of common employment. For what is there in the present case? The plaintiff is bringing in coals which are necessarily brought under the flap; he knew that other persons were employed above; the coals were necessary for the brewery, and there was an employment of the plaintiff in the business of the brewery, and the risk was one to which he naturally exposed himself. When once we have the fact that the plaintiff was a servant of defendants, it comes within all the decisions to hold that he was in a common employment with the person through whose negligence he was injured. To constitute a common employment the two persons need not be working at the same thing at the same time. *Wilson v. Merry, ubi sup.*, where the negligence which caused the injury had occurred some time before, shows that it is not necessary that the two persons should be working together; if there is a common employment such that the servant must know that the master would employ other persons to the risk of whose negligence he would be exposed, that is enough to prevent his recovering. Another objection taken was that this was a danger which the plaintiff could not foresee; but the plaintiff must have known that other persons were employed, and I should say that the danger of the flap falling was a danger with reference to which he must be taken to have contracted. Whether the exception to the general rule as to liability for negligence which prevents him from recovering is a good one in point of policy is a question with which we have nothing to do. If it is bad it is for the Legislature to remedy the evil; and we should do great harm if we were to draw minute distinctions in order to avoid hardship in individual cases.

THESIGER, L. J. I am also of opinion that the judgment of Lopes, J., ought to be affirmed. The starting point is a question of fact, whether the plaintiff was the servant of the defendants or not. If that question were answered in the negative, I should hesitate to apply the case of *Woodly v. The Metropolitan District Ry. Co., ubi*

sup., and say that the plaintiff undertook the risk; but it is unnecessary to consider this, because in my opinion Lopes, J., was justified in finding as he did, or at least there was sufficient evidence on which he could find. The facts have been dealt with by Brett, L. J. Ansell said he was servant to the defendants, and he engaged other workmen who were not the servants of Ansell, to be paid and discharged by him; they were paid a lump sum by the defendants, but that sum was divided among them. It was stated that Ansell could not discharge the plaintiff without asking the defendants; if so, the case is undistinguishable from *Morgan v. The Vale of Neath Railway Co., ubi sup.* There it was argued that the rule as to common employment only applied where the employment as to its immediate object was common; but it was held that that argument was not well founded; and it was laid down clearly by Blackburn, J., in the Court of Queen's Bench, and upheld in the Exchequer Chamber, that if there is one general object which brings the servants into contact so that they are exposed to risk, the master is free from liability. On the facts there it was held that the nature of the carpenter's duty was such as necessarily to bring him into contact with the traffic on the line. How is that distinguishable from the present case? There was a general object here, for the work was all being done for the purposes of the brewery. The coals were for the brewery. It was necessary for the plaintiff to go up the steps, and the flap had to be raised. Just as the man on the ladder, in *Morgan v. The Vale of Neath Railway Co.*, was brought into contact with the porters who were engaged in shifting the engine, so here the plaintiff was necessarily brought into contact with the person who was moving the barrels. If so, the principle of that case applies. I do not think the particular risk which causes the injury must be known to the servant as a matter of fact in order to exempt the master; but the case is within the rule, if he might have known of it and he must be taken to have contemplated it. Though in fact he was not aware of the danger, this does not make the master liable. I think, therefore, that the judgment ought to be affirmed.

COTTON, L. J. I wish to add a word to avoid misapprehension. What I said was that,

even if it were necessary that the plaintiff should know of the risk, the evidence here was that he did know of it, but I think it is not necessary that he should know. I should rather put it on the ground of contract. Having undertaken the risk of the acts of his fellow-servants, the servant cannot say they were the acts of the master.

Judgment affirmed.

RECENT UNITED STATES DECISIONS.

[Continued from page 420.]

Riparian Owner.—A railway company built its road through a lake, cutting off the riparian owners from access to the lake, and leaving in front of their land a pool of stagnant water. *Held*, that they were entitled to recover damages.—*Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 248.

2. But where a railway company, in building its road in like manner, occupied land which the riparian owner had made by filling in the lake in front of his land, it was *held* that he was entitled to no damages by reason of such occupation.—*Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248.

Set-Off.—A. gave a note to B., who assigned it to C., and afterwards the note being due and unpaid, brought an action on it against A., for C.'s benefit. At the time of the assignment B. was insolvent, and C. knew it, and B. soon after became bankrupt. *Held*, that A. could not, at law or in equity, set off a note made to him by B., and not yet due.—*Spaulding v. Backus*, 122 Mass. 553.

Ship.—Upon the sale of a vessel, she must be registered or enrolled anew, or she ceases to be a vessel of the United States; and a subsequent mortgage of her acquires no validity by being recorded according to act of Congress.—*Johnson v. Merrill*, 122 Mass. 153.

Tax.—Covenant by the lessee, in a lease, to pay the taxes of every name and kind that should be assessed on the premises at any time during the term, *held*, not to cover an assessment for benefits by permanent street improvements.—*Beals v. Providence Rubber Co.*, 11 R. I. 381.

Variance.—Indictment on a statute for keeping a disorderly house. The structure in

question was proved to be a tent. *Held*, no variance.—*Killman v. The State*, 2 Tex. Ct. App. 222.

Voter.—At an election the polls were closed an hour before the lawful time. *Held*, that if no fraud was shown, and it did not appear that any one offered to vote during that hour, or was prevented from voting by reason of such closing, the election was valid.—*Cleland v. Porter*, 74 Ill. 76.

Way.—Plaintiff bought a lot in a cemetery, according to a plan which showed the lot as bounded on a certain avenue. *Held*, that he had, as appurtenant to the lot, a right of way over the avenue, and might have an injunction to restrain an obstruction of it, making his lot less accessible.—*Burke v. Wall*, 29 La. Ann. 38.

CURRENT EVENTS.

ENGLAND.

CRIMINAL CODE BILL.—A large meeting of Queen's Counsel was held in London to consider the Criminal Code Bill submitted to Parliament, but not passed, at the recent session. The meeting began on Monday, and extended over two days. The provisions of the bill underwent a minute and careful examination, and it is probable that the meeting will submit to the Attorney-General a number of important suggestions for alterations in the bill. It does not at present extend to Ireland but in all probability will be eventually extended, with some necessary modifications, to that country.

IRELAND.

INSANITY OF JUDGE KEOGH.—A cable despatch conveys the melancholy intelligence that Mr. Justice Keogh is laboring under mental derangement. It states:—

Judge Keogh entertained an idea that his servant and registrar had entered into a conspiracy to shut him up in a lunatic asylum. At the dead of night, he went into the servant's room, armed with a razor, and cut him in the neck, and also severely in the stomach. He then left him and proceeded to the registrar's room. The registrar, hearing the noise, started up. Seizing a large pillow, he closed with his assailant, and shouted for help. The people in

the hotel were alarmed, and finally the judge was disarmed and shut up in a strong room of the convent, as there was no asylum in the place. Since his confinement, the judge has attempted to destroy himself. He will be placed in the asylum at Bruges. The Government have already taken steps to fill his place on the Bench.

UNITED STATES.

AMERICAN BAR ASSOCIATION.—The organization of "The American Bar Association" is one of the most noteworthy events in the history of jurisprudence in this country. To assimilate and unify the laws of the several States, especially so far as they relate to commerce and to crime, is a consummation devoutly to be wished by every lover of his country, for not only will it facilitate intercourse and harmony among the people, but it will also be one of the strongest bonds of union among the several States. The meeting at Saratoga called together an unusual number of representative lawyers and jurists—men who have made their mark either in the forum or upon the bench, and the interest and enthusiasm manifested in the undertaking show unmistakably that the time is come for such an organization. To our thinking, it would have been better could such an association have been composed of delegates from bar associations of the several States—just as State bar associations would be more influential—more potent if formed of delegates from county or local associations, but with the few State bar associations which now exist, such a formation is at present impracticable, and that which has been made at Saratoga seems to be the best substitute. The proceedings of the two days through which the meeting extended are notable for the absence of "talk" to which lawyers are sometimes addicted. The business in hand was discussed by the best men present, and with an obvious desire to secure the best organization—the best results possible. This, we believe, has been done, and under the administration of the men who have it in charge, "The American Bar Association" can hardly fail to prove of great service to the profession and to the country.—*Albany Law Journal*.

THE U. S. AND MEXICO.—The subject of extradition with Mexico is one of considerable

importance in the States of our Union bordering on that country, and on that account the decision of the Mexican Supreme Court, which has just been communicated to the government authorities at Washington, that the Mexican law will permit the delivery up of offenders, upon an application made by the authorities of one of our States, will be received with much satisfaction here. In the case passed upon, the authorities of the State of Texas applied to those of an adjoining Mexican State for the surrender of two fugitives, who were charged with murder in Texas. An inferior Mexican court, however, ordered the discharge of these persons from custody, but the Supreme Court, by a vote of nine to five, reversed this decision, and ordered the surrender.—*Id.*

CANADA.

THE ORANGE ASSOCIATION.—Several prominent Orangemen having been arrested, at Montreal, for attempting to walk in procession to church on the 12th of July, a criminal prosecution was brought against them as members of an illegal association (*ante* p 371). A difficulty, however, occurred in attempting to prove, before the Police Magistrate, that the accused were Orangemen, the witnesses called declining to answer the questions put to them relating to the Orange Order, on the ground that they could not answer without admitting that they were themselves Orangemen, and that they would thus incriminate themselves. In the case of Col. Smith, one of the witnesses, so refusing to answer, an application was made to commit him for contempt, and the magistrate granted it. But on petition for *habeas corpus* before the Chief Justice and two Judges of the Queen's Bench, the witness was liberated, on the ground that he was within his right in declining to answer a question which might render him liable to a criminal prosecution.

The counsel for the prosecution have addressed the following letter to the Dominion Government:

To the Honorable Richard W. Scott, Secretary of State:—

SIR,—We are acting for the prosecution in the case of the Queen *vs.* David Grant *et al.*, which originated in an information, sworn to by one Murphy, to the effect that the defendants are Orangemen, and as such are members of an illegal association, and that they met on the

12th of July last at their Lodge Room, for the purpose of walking through the streets of the city in a procession likely to endanger the public peace, or having such a tendency.

We are now proceeding with the preliminary examination before the Police Magistrate, and the witnesses so far examined to prove the constitution of the Orange Order, the nature of the oath taken by the members of the Order, and the fact that the accused are Orangemen, have refused to answer, on the ground that they may criminate themselves.

While convinced that the privilege claimed does not exist in this case, and that the decision of the Police Magistrate to that effect is in every way correct, we consider it would be in the public interest, that a pardon be offered the witnesses in question, so that there be no new pretext for mischievous agitation, in connection with a question which inflames so many passions.

We, therefore, have to require that his Excellency, the Governor-General, will grant a pardon in particular to Lieutenant-Colonel George Smith, the witness presently under examination, for any act committed which would make him liable to be prosecuted under Chap. 10 of the Consolidated Statutes of Lower Canada, relating to seditious and unlawful associations and oaths, or under the Common Law, for organizing and engaging in a procession likely to endanger the public peace, or having such a tendency.

We have authority to speak for our clients only, but we may perhaps be permitted to state that there is a very large and very influential portion of the population of the city of Montreal, who, while taking no part in the controversy between the Orangemen and their opponents, are greatly interested as property owners, and as citizens engaged in trade, in the preservation of the peace of this city and its good name, and that class, no less than our clients, are anxious that the question whether the Orangemen have a right to walk in procession should be tested before the Courts.

The anomaly of the present state of things is, that while the Orangemen loudly assert the perfect legality of their Order, and claim to be protected by the authorities, at all hazards and at whatever cost, in their attempt to walk in procession, they refuse before the Courts to

acknowledge themselves Orangemen, for fear of incriminating themselves, and this they do in the hope that thereby they will render fruitless any proceeding calculated to test the validity of their pretensions.

We have the honor to be, Sir,

Your obedient servants,

EDWARD CARTER,

EDMUND BARNARD.

GENERAL NOTES.

TITLES.—The English Court of Appeal, according to the *Solicitor's Journal*, appears to be somewhat of the opinion of Sir Thomas Smith, who saith: "As for gentlemen, they be made good cheap in this kingdom; for whosoever studieth the laws of this realm . . . he shall be called master, and shall be taken for a gentleman." In the course of the hearing of a petition in lunacy for the appointment of new trustees on the 7th ult., one of the persons proposed as a new trustee was described as an "esquire," and one of the persons who made an affidavit of fitness was described as a "gentleman." It was stated that the "esquire" was, in fact, a justice of the peace, and that the "gentleman" was a solicitor. Lord Justice Cotton said that though the legal description of a solicitor was "gentleman," that term was very indefinite, and ought not to be used. In such an affidavit a solicitor ought to be described as a "solicitor," in order that the court might know his real position in life. And the term "esquire" was even worse than that of "gentleman," for it conveyed no information whatever to the court. A man who was a justice of the peace should be described by that title.

Method is essential, and enables a larger amount of work to be got through with satisfaction. "Method," said Cecil (afterwards Lord Burleigh), "is like packing things in a box; a good packer will get in half as much again as a bad one." Cecil's despatch of business was extraordinary, his maxim being, "The shortest way to do many things is to do only one thing at once."

Henri de Tourville, the Englishman, who was convicted by an Austrian tribunal and sentenced to death for wife murder, and whose sentence was afterwards commuted to one of twenty years' penal servitude, has been disbarred, and his name removed from the list of members of the Honorable Society of the Middle Temple.

The Legal News.

VOL. I. SEPTEMBER 14, 1878. No. 37.

MR. JUSTICE JETTÉ.

The vacancy on the Bench of the Superior Court, caused by the death of the late Mr. Justice V. P. W. Dorion, has been filled by the appointment of Mr. L. A. Jetté, of Montreal. Mr. Jetté is a gentleman of high standing in the profession. He was admitted to the bar in February, 1857, and by abilities of a high order, and close attention to professional work, speedily attained a considerable practice. Among the important cases in which he was concerned may be mentioned the celebrated Guibord case, in which he was counsel for the Fabrique in defending the suit. In 1872 he first entered public life, being elected by a large majority, for the division of Montreal East, over his distinguished opponent the late Sir George E. Cartier. In the general election of 1874, Mr. Jetté was returned for the same seat by acclamation. Appointments to the Bench in Canada are probably too much restricted by considerations of politics and nationality, and in the present case advocates of greater distinction are for this reason passed over. But apart from this, Mr. Jetté's appointment is a good one, and will, we believe, give much satisfaction.

SAUVÉ v. SAUVÉ.

We thought we had sufficiently explained (*ante*, p. 385), our opinion that the cases of *Sauvé v. Sauvé*, and *Berthelot v. Theoret* were essentially different. An esteemed correspondent, however, overlooking perhaps our brief reference to the cases, writes us on the subject, pointing out the material differences between the two suits. He says:

"In the case of *Berthelot v. Theoret* it is clear that facts were alleged and proved showing the *cessionnaire* to be proprietor of the debt sued for; hence the *cédant* could not sue. In *Sauvé v. Sauvé* there were facts proved, too, showing that the "third party" had no action. His interests, once held by him, he had *resiliated* by an *acte sous seing privé*, but to which force had to be given."

We should add that the head notes prefixed to the reports, as we received them from our correspondent, were not in strict accordance with the facts as we view them, but unfortunately were printed without the emendations which we intended to have made.

BANKRUPTCY FRAUDS.

The U. S. Bankrupt law passed out of existence on the 1st September, except for pending cases, and there was a considerable rush of debtors, even in the last days and hours of the Act, to bring themselves under its provisions. In the city of New York there were on the last day 394 petitions filed; in the district including Chicago, 375 petitions; in Cincinnati, 100; in Buffalo, 198; and in Philadelphia, 69. Physicians, lawyers, and even clergymen swelled the number of those seeking relief from the demands of their creditors. Advertisements appeared in journals of New York, inserted by attorneys tendering their services to help clients to a full, free and quick discharge from all their liabilities. These, however, are not so remarkable as a daring announcement in the *N. Y. Herald*, which attracted the attention of a reporter of the *World*. The notice was as follows:—

If you contemplate bankruptcy you can procure \$48,000 good, genuine, regular securities; no more of same kind exist; have never been offered; terms to suit contingency. Address, confidentially, Attorney, box 112, *Herald* Office.

Acting in that detective capacity which has been called into play by the press in these latter days, the reporter answered the advertisement under an assumed name, and in due time he received the following reply:—

HENRY H. HADLEY, Attorney and Counsellor at Law, 307 Broadway, N. Y., Aug. 15, 1878.

DEAR SIR,—Your favor referring to bankruptcy, dated 14th inst., was duly received and contents noted.

If convenient, please call on me to-morrow at 11 a.m., or from two to three p.m., here at my office, that we may talk the matter over as requested. I remain, confidentially yours.

H. H. HADLEY, Attorney.

The reporter called on Mr. Hadley at his office, and found him busily engaged with two elderly and eminently respectable-looking gentlemen. After waiting some time the reporter was ushered into the lawyer's office. Upon representing himself as the special partner of a firm of hatters who were about to fail, he

received most respectful attention. We continue the narrative in the words of the reporter.

"How much do you owe?" Mr. Hadley asked.

"About \$75,000," was the reply.

"How much assets have you got?"

"About \$20,000."

"What have you done with the rest?"

"Spent it."

"Who?"

"I and my partners."

"How much have you drawn?"

"About \$6,000."

"How much did you put in the firm?"

"Twenty thousand dollars; that is, \$12,000 cash, and \$8,000 I still owe."

"Ah! Is your book-keeper all right?"

"He is."

"Can he so change the books as to make it appear that you drew all this \$12,000, and that, in return for it and as security for the \$8,000 you owe, you gave them \$50,000 of securities, without further recourse to you?"

"He can."

"Will he?"

"He will, sure."

"That'll do," said Mr. Hadley, "my client has \$50,000 worth of Southern land bonds; they are worth nothing in the market; they may (with a smile) some day be worth their face value. They are for lands granted to him on the Chattanooga and Cincinnati Railroad. He will sell them for \$1,000 cash."

"Good," replied the reporter, "but how am I to show where I got them from?"

"He shall give you a bill of sale, you shall turn over to him some stock in exchange—he will furnish it for you—and you give him the \$1,000 besides. His bill of sale will be dated back as far as you like, so as to make the whole transaction look genuine, and, of course, you explain to your creditors that your unfortunate land speculation has led to your failure. You give them a few thousands in cash, then bonds and what stock you have on hand, and go on your way rejoicing. Twig?"

Some further conversation occurred with reference to the best mode of covering up the tracks and giving the swindle a genuine look. The reporter was informed of others who had successfully played the same game, and it is stated on good authority that a great deal of business has been done in the way of buying cheap or worthless stocks, and holding them for use, by intending bankrupts who desire to make a show of assets, the purchase in such case being made to date back to the time when the securities were quoted higher. This is but one, and a small, part of the gigantic network of fraud which envelops every part of the bankruptcy system, and it is not wonderful that

through such revelations the law has come to have an evil odor, and dies regretted by few save those who have turned it to their profit.

CONTRIBUTORY NEGLIGENCE.

[Continued from p. 426]

Ernst v. Hudson River R. R. Co., 35 N. Y. 9. —Plaintiff's testator was killed while crossing defendants' track with his team, on his way to a ferry at Bath-on-the-Hudson. It had been customary to keep a flagman at this crossing, but on this occasion there was none; at least the evidence strongly preponderated that way. As he approached the crossing, Ernst looked north, above the station-house, and saw no train. The ferryboat was just starting, and a by-stander hailed the ferryman to wait, and beckoned Ernst to hurry on. Signals were made from the boat for him to come on; he started up his horses on a trot, when just as they were within two or three rods of the track, the engine appeared from behind the station-house. At the same instant two men shouted to him from different directions, he vainly tried to rein in his horses, they plunged on the track, and he was struck by the engine and killed. At the circuit the plaintiff was nonsuited, and this was now set aside.

The court say, that the omission of the customary signals is an assurance by the company to the traveller on which he may rely that no engine is approaching within eighty rods on either side. If the usual warning is withheld, the wayfarer is not bound to stop and look up and down the track, but may assume that the crossing is safe. It is no answer to his claim for redress for injury, that notwithstanding the omission of the signals, he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the statute instead of relying upon an observance of it.

Remarks.—This is the most celebrated railroad case in our books. It had been once before to the Court of Appeals, and a new trial had been granted upon a very different state of facts, as we learn from the opinion of Judge Porter on this hearing. The former decision is not reported in the regular series, but one of the opinions was reported in 24 How. 97, with erroneous head notes and statement of facts. In the present decision all the judges concurred. The

opinion of Judge Porter is one of the ablest to be found in our reports. He makes these excellent observations on nonsuits: "Our law is framed upon the theory that on such questions the citizen can rely with more security on the concurrent judgment of twelve jurors, than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law. It is otherwise with jurors charged with the duty of determining issues of fact; and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result, that there is no room for difference between honest and upright men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that if the question were submitted to the jury, they would find that the culpable negligence of the plaintiff contributed to the injury. But we have had occasion, recently, to hear nonsuits of this kind justified on the novel ground, that unless the fact be determined in one way by the judge, it will be sure to be determined the other by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted, where we find them confessedly opposed to the common sense of mankind."

The case came up a third time in 39 N. Y. 61, when a verdict for the plaintiff was sustained. The views of the court above expressed as to the absence of the flagman were approved; but the judges differ as to the extent that the defendants' negligence excuses the plaintiff's want of vigilance. Judge Clarke thinks the omission of the customary warnings and signals may excuse the plaintiff from looking up and down the track just before crossing; and that "the court, in its last review of this case, in no respect relaxed the salutary rules which it had in many previous cases adopted in relation to the negligence of persons who are on railroads." Judge Woodruff, in a following opinion, on the other hand, says: "Negligence in the railroad company in the giving of signals or in omitting precautions of any kind will not excuse his omission to be diligent in such use of his own means of avoiding danger," and that if by such use he might have avoided the danger, notwithstanding the omission of the signals, his omission is concurring negligence, and where proof of it is clear, he

should be nonsuited. But he concludes that in this case the question was so complicated and detailed, that it was properly left to the jury.

Sheridan v. Brooklyn City, etc., Company, 36 N. Y. 39.—Deceased was a boy, nine years old, who took a seat in defendants' horse-car, but in order to make room for adults, the conductor put him out of his seat, and the car being crowded, he was pushed by the passengers out on the front platform, and was afterward thrown off by another passenger rushing to get off, and was run over and killed. A verdict for the plaintiff was unanimously sustained.

Renwick v. N. Y. Cent. Railroad Co., 36 N. Y. 133.—The plaintiff, approaching a crossing, stopped when from four to six rods from the track, looked both ways and listened, and seeing and hearing no indications of a train, started his horses, kept looking for the train, and when on the track was struck by the train which he saw close upon him. This was held not necessarily negligent, and judgment for plaintiff was affirmed.

Clark v. Eight Ave. Railroad Co., 36 N. Y. 135.—The plaintiff was injured while riding on the steps of the front platform of the defendants' street car, by a passing team. The car was so full that there was no other place for him to stand, and the conductor received his fare and suffered him to stand there. The court said "these facts, if true, authorized the jury to find that the plaintiff had been invited by those having charge of the car to ride in that place, and that an implied assurance had been by them given that that was a suitable safe place for him to ride," and judgment for plaintiff was affirmed; but the court say that without such explanation the position of the plaintiff would have shown him negligent, and it would have been the duty of the court to nonsuit.

Remarks.—The observation last quoted is an excellent example of what is called an *obiter dictum*, although, at the risk of being accused of uttering the same thing, we will say that the learned judge was quite right in that position.

Curran v. The Warren Co., 36 N. Y. 153.—Defendants were distillers of coal tar. The deceased was engaged by them in manufacturing boilers, and was obliged to work inside of the defendants' boiler, entering through an orifice

opened for the purpose. He entered the boiler as usual, and instantly fell dead in consequence of inhaling the poisonous gas collected in it. It appeared that the ventilator in this boiler, which acted as a safety valve for the escape of the noxious gas, had been closed by the direction of the deceased. This was held contributory negligence, and a verdict for plaintiff was set aside. As there was no dispute about these facts, it was held that a nonsuit should have been granted as requested.

Ferris v. Union Ferry Co., 36 N. Y. 312.—Plaintiff was a passenger on defendant's boat. On the arrival of the boat at the slip, the guard chain was let down before the boat was completely fastened, and the plaintiff proceeding to leave the boat, her foot slipped into an opening between the boat and the floating dock or bridge, and she was injured. She was held not negligent, the dropping of the chain being an assurance to passengers that the boat was properly secured and exit was safe.

Milton v. Hudson River Steamboat Company, 37 N. Y. 210.—Defendant agreed to tow plaintiff's boat to New York and to place it between two other boats. Defendant did not place the boat between two others, and part of the cargo was washed overboard. The referee found that the crew on plaintiff's boat did not exercise proper care over the boat, but that, if defendant had placed the boat between two others as he had agreed, the injury would nevertheless not have happened, and he reported in favour of plaintiff. This judgment was reversed.

McIntyre v. N. Y. Cent. Railroad Co., 37 N. Y. 287.—Deceased was a passenger on defendants' train, and had no seat. He was directed by one of defendants' servants to pass forward, while the train was in motion, to another car where there were unoccupied seats. In attempting to do so, in some unknown manner, he fell between the cars and was killed. A recovery was affirmed, the court holding that it was for the jury to decide whether the deceased was guilty of any negligence in attempting to carry out the defendants' directions.

Davenport v. Ruckman, 37 N. Y. 568.—The plaintiff, who was partially blind, walking on the sidewalk, fell into an excavation suffered by defendant to exist on his premises and was injured. A recovery was approved, the court

holding that the question for the jury was, "had the plaintiff sight enough to go, with reasonable assurance of safety, through the streets if they were kept in good condition?"

Wolfkiel v. Sixth Ave. Railroad Co., 38 N. Y. 49.—Plaintiff was injured while getting on the front platform of a street car run by defendant. The testimony was conflicting as to whether the car was then in motion, and the question was properly submitted to the jury.

Nichols v. Sixth Ave. Railroad Co., 38 N. Y. 131.—Plaintiff, while on the front platform of defendants' street car, asked the driver to stop, and the driver brought his horses down to a walk when the plaintiff stepped down on the step to get off, and the car stopped; while he stood there, a sudden start of the car threw him off. The court held that the plaintiff had a right to occupy the step, and whether he was negligent while in that position was a question for the jury. They say: "While passengers have no right to jump off a car while in motion, or to make an attempt to do so, yet they are authorized to prepare to leave when there is evidence of an intention to stop or any signal given for such a purpose."

Gonzales v. N. Y. & Harlem Railroad Co., 38 N. Y. 440.—Deceased, in stepping from a car, was killed by an express train on an adjoining track. It appeared that he must have been a passenger on this train, lived in sight of the station, and must have known that the express was then due. The court held that, if he did not look out for this train, he was guilty of negligence, and if he did look, he must have seen the train within a few feet of him, and his attempt to cross in front of it was reckless. Judgment for plaintiff reversed.

Wilcox v. Rome, etc., Railroad Co., 39 N. Y. 358.—The plaintiff's intestate was killed at a village street crossing with which he was familiar, and where, if he had looked, he could have seen a train for seventy or eighty rods. There was evidence that there was no bell rung or whistle sounded. It was held that it must be presumed that he did not look for the train, and thus was negligent, and that the defendant's omission of signals did not excuse him.

Remarks.—Here, for the first time, we find an explicit avowal of Judge Porter's doctrine in the *Ernst* case. Judge Miller says, of that case:

"The opinion of one of the judges holds that the omission of the customary signals is a breach of duty, and an assurance to the traveller that no engine is approaching from either side within eighty rods of the crossing, and that he may rely on such assumption without incurring the imputation of a breach of duty to a wrong-doer. Upon a re-trial of the case a verdict was rendered in favor of the plaintiff, and, on an appeal to this court, the judgment was affirmed. Several of the judges placed their decision upon other and different grounds than the failure to give the necessary signals, and I do not understand that a majority of the court held that such neglect was an assurance of safety, which relieved the wayfarer, who did not look, from the imputation of negligence."

Haavens v. The Erie Railway Co., 41 N. Y. 296.—The intestate was killed at a railroad crossing. There was evidence that no warning was given by bell or whistle. The court charged that the deceased was not bound to stop and look up and down the railroad unless there were signals given, and, if he heard no signals, he had a right to assume that there was no train within eighty rods of the crossing, and refused to charge that if, at any point within ten rods of the crossing, he might easily have seen the approaching train nearly a mile off, he was bound to look up and down the road, and if, by omitting so to do, he lost his life, he cannot recover. This was held error.

The court remark: "At the time the case was tried some doubt existed as to the law upon these points in this State. Opinions given in this court, published in the reports, had laid down the law as it was given by the judge to the jury in the present case; but a close examination of the cases in which they were given will fail to show that such was the doctrine of the court. On the contrary, the rule that any negligence of the party injured contributing thereto will bar a recovery therefor, has been uniformly adhered to. It may now be regarded as settled, by this court, that a traveller approaching a crossing is bound to use his eyes and ears in looking and listening to ascertain whether trains are approaching, irrespective of the question whether the signals required by the statute are given upon the train, and that, if an injury is received in consequence

of his omission so to do, he cannot recover therefor."

Two judges dissented, on the ground that, although the judge had refused to charge as requested, yet the judge had charged that men approaching a railroad in plain sight are bound to look for approaching trains.

Baxter v. Troy & Boston Railroad Co., 41 N. Y. 502.—Plaintiff was injured by defendant's train while he was attempting to cross their track. The evidence was conflicting as to whether the defendants gave the requisite warnings and as to plaintiff's ability to see the train in time to avoid it; but the plaintiff testified that he did not look for the train, and did not hear it, although it could be heard from his residence, twenty rods west of the crossing. The court, by Grover, J., said: "My impression, from the evidence, is, that the plaintiff could, by looking, have seen the train and avoided the danger, and should, therefore, have been nonsuited, but, as a new trial must be granted on other grounds, I will not further consider it." The ground on which the new trial was granted was the refusal of the judge to charge that the plaintiff was not relieved from the duty of exercising ordinary prudence in approaching the crossing, by the omission of the defendants to give the required signal on approaching said crossing.

Remarks.—The *Wilcox* case is cited as the authority for this position, and we may, therefore, consider these two cases as an authoritative disavowal of the contrary doctrine in the *Ernst* case. Judge Grover limits the duty of looking out to looking along the track *when unobstructed*, and says it is not necessary for a driver to leave his team and go upon the track.—*Albany Law Journal*.

—A woman charged with burglary in Liverpool, and found with a full set of tools in her possession, was lately brought to trial, and set up as a defence that she was subject to attacks of neuralgia, and had taken chloral to deaden the pain until she didn't know what she was about. The jury acquitted her, which led the presiding judge to exclaim that in the whole course of his experience he had never heard of a verdict that so shocked him.

THE TRIAL OF ELECTION PETITIONS.

The London *Times*, referring to the renewal of the Election Petitions Act of 1868, has some observations upon the trial of election petitions, which are of interest in Canada :—

"It (the Election Petitions Act) was passed for three years on the understanding that by the close of that time the light shed upon the subject by the trials held under it would enable Parliament to affirm it once for all or to supersede it by some more scientific procedure. But at the termination of the three years the accumulation of experience appeared insufficient for condemnation or for absolute approval; and once given a certificate of mortality it promises to be immortal. Seven times, complains Mr. Charles Lewis, this three years' Act has been renewed, and seventy times seven, for all we can see, may it be renewed. In truth, the theme is a very delicate and not a very palatable one to broach in the House of Commons. Members do not like to be ejected from their seats and punished for bribery by a single Common Law Judge; but, like the eel with its objection to be skinned whether headwards or tailwards, they would find ground to criticise the process however and by whomever conducted. The old trial by Committee of the House was an offence to all reasonable men, who doubted the legal shrewdness, and in former times the impartiality, of the tribunal. The present system offends Mr. Lewis, because leaving, as he phrases it, "the liberties and "privileges of constituencies at the mercy of "the decision of judges from whom there is no "appeal."

"Mr. Lewis produces a formidable indictment against the Chancery Courts of First Instance by way of evidence that *a fortiori* the representation of the kingdom ought not to depend on the irresponsible verdict of a single judge. The statistics of the Court of Chancery, according to a return produced by him, show that out of 253 decisions pronounced in the course of fifteen months, only 106 had remained undisturbed by Superior Courts. He might have added that in many suits in which the defeated side cannot afford to appeal a reversal might similarly have been obtained. On the other hand, we believe examination would elicit that the Court of Appeal had merely varied a large

number of the balance of 147 decisions in some collateral and minor points. A considerable difference, moreover, exists between the perplexed problems of mixed law and fact which come before a Vice-Chancellor or Master of the Rolls, and the simple charges of bribery which form the general substance of an Election Judge's inquiries. When a point of law arises in an election inquiry petitioners and respondents have already the right of appeal. Nevertheless, after all deductions, experience of the general and demonstrable fallibility of Courts justifies a suspicion that even on matters of fact, Election Judges are not more infallible than their fellows, and that several of their decisions would probably have been reversed by an appellate tribunal. Different minds draw very different inferences from the same circumstances, and one Election Judge may have connected the successful candidate with corrupt practices for which another judge might have held him in no way accountable. As the Attorney-General remarked on Monday, intelligible principles have now been laid down with reference, for example, to what does and does not constitute agency; but though the bare principle may be formulated beyond dispute, it will still admit of a dozen diverse applications. It is of the very essence of an election petition that the corrupt ingenuity which it is the judge's task to track has painfully overlaid the facts with every imaginable degree of shade and colour. An unerring conclusion could not be insured by two or more judges, as Mr. Lewis suggests in conformity with the report of the Select Committee of 1875, nor by one Court of Appeal, for which the Attorney-General avows his own preference. To borrow Mr. Lewis's parallel of other Courts of Justice, it is familiar experience that a decision of a Divisional Court reversed by a Court of Appeal is upheld by the House of Lords Room is left for surmise that a yet more exalted tribunal might even reverse the decision of the House of Lords itself.

"Special difficulties environ the question how to construct a perfect court for the trial of election petitions. We agree with Mr. Lewis in thinking it an anomaly that the highest of an Englishman's rights should be at the mercy of a single judge, from whom, except on points of law, there is no appeal. It is no answer that,

if a single judge can be trusted to try a man for his life, he may be trusted to try the right to sit for the borough of Great Yarmouth. In criminal trials the fact is within the jury's province, and the judge propounds the law. But the addition of a second judge to Election Courts would not be sufficient. Unless the Court consisted of three, sometimes no decision could be arrived at, and the withdrawal of three judges from the ordinary judicial business of the country would create serious embarrassment. To cause a block in the general legal business of the community for the six months following a general election, or to add a superfluous three judges to the judicial Bench for the exigencies of half a year in every six or seven, is a vexatious dilemma. Indeed, a tribunal of two, or even three, would not solve the difficulty satisfactorily. However strong the Court which first heard the case, a defeated litigant desires the ventilation of his grievance by an entirely fresh tribunal. Nothing but a Court of Appeal will content him, and a Court of Appeal in election disputes implies a second investigation of the facts, with all the consequent unsettlement of a neighborhood and reduplication of legal expenditure. The Chancellor of the Exchequer has pledged the Government to put a Corrupt Practices at Elections Bill in the very front of the business of next Session of Parliament; and Sir John Holker intimates that the Bill will grant a right of appeal to candidates adjudged guilty of bribery. But we do not clearly apprehend, nor perhaps, does the Attorney-General, whether the appeal is to be a matter of general right or limited to a candidate convicted of bribery. In the majority of cases the justice of the primary decision is obvious. No one ever felt inclined to dispute the judgments in the old decisions against Taunton and Norwich. Cases like that of Launceston raised other issues. More satisfaction would have been felt had either the original verdict proceeded from two or three judges, or had the unseated candidate been entitled to appeal. The problem is how to construct a legal strainer through which only questions of real difficulty shall percolate to the Court of Appeal. A Court of Appeal in some shape there must be, and it must have jurisdiction to investigate questions of fact as well as of law. Perhaps means might be found

of settling between court and counsel, at the close of the original hearing, what facts and what heads of evidence were to be subjected to the ordeal of a second scrutiny. It is a delicate question, and not the less delicate that Parliament will have to solve it with a general election staring it in the face."

DAMAGES FOR PROSPECTIVE INJURY.

HIGH COURT OF JUSTICE, QUEEN'S
BENCH DIVISION, MAY 13, 1878.

LAMB V. WALKER.

The plaintiff sued the defendant for injury to the buildings of the plaintiff by mining operations of the defendant on the land of the defendant. A special referee having found that the plaintiff in addition to injury already incurred, would incur injury in the future, and having assessed the prospective damages in respect of such injury at £150: *Held*, by Mellor and Manisty, JJ. (*dissentiente* Cockburn, C.J.), that the prospective damages were recoverable.

This action was brought by the owner of land for damages caused by an excavation by an adjoining mine owner under plaintiff's land which caused his building to settle. The case was tried before a special referee who reported that the damage which had been done to plaintiff by the excavation at the date of the commencement of the action was £400, and that he estimated the future damages that would be incurred to be £150, the total amount being £550, of which £150 had been paid into court. The plaintiff took out a summons to defendant to show cause why plaintiff should not be at liberty to sign judgment for £400. Subsequently a rule was granted calling upon plaintiff to show cause why he should not accept judgment for £250, the balance found to be due him for the damages already accrued, which rule was duly argued.

Cave, Q.C., against the rule.

Gainsford Bruce, for the rule.

MANISTY, J. (after stating the cause of the action as above.) I am of opinion that the plaintiff is entitled to recover the £150 [the amount of future damage], and that consequently the rule to reduce the damages should be discharged, and the plaintiff should be at liberty to sign judgment for £400 and one farthing, and taxed costs. It is noteworthy that the referee finds as a fact that

further damages to the extent of £150 now in question will be sustained by the plaintiff by reason of the wrongful acts of the defendant complained of in the fifth and sixth paragraphs of the statement of claim. The defendant, by paying money into court generally, has admitted all the material averments contained in the plaintiff's statement of claim. But it was contended on his behalf that, inasmuch as his mining operations in his own land were not *per se* wrongful acts, the plaintiff's only cause of action was the "consequential damage" done to the plaintiff's property up to the time of the commencement of the action. It was contended on the part of the plaintiff that, although he had no cause of action against the defendant until his land and buildings were injured, nevertheless, as soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct. The cases relied on by the defendant only decided that, without "consequential damage," there was no cause of action. But there is no authority, so far as I know, for the proposition that damage *per se* and apart from a wrongful act can constitute a cause of action. The plaintiff's right was to have his land and buildings supported by the subjacent and adjacent soil or strata, and so long as they were in fact supported he had no cause of action; but as soon as the support which was left proved to be insufficient, and injury to the plaintiff's property ensued, then the defendant's act in withdrawing the necessary support became wrongful. *Damnum* and *injuria* concurred, and the plaintiff's cause of action then accrued. That point is, as it seems to me, concluded by the judgment of the House of Lords in *Backhouse v. Bonomi*, 9 H. L. 903. But it is said, on the part of the defendant, that, assuming this to be so, the true measure of the damage recoverable in this action is the injury actually done to the plaintiff's land and buildings up to the time of the commencement of the action, and that his

remedy for subsequent injury is by bringing actions from time to time as and when further injury accrues. I am of opinion, both upon principle and authority, that such is not the law. See *Nicklin v. Williams*, 10 Exch. 259, as explained and approved upon this point, by the Exchequer Chamber in *Bonomi v. Backhouse*, E. B. & E. 646-658, and by the House of Lords in *Backhouse v. Bonomi*, 9 H. of L. Cas. 503. See, also, *Hamer v. Knowles*, 6 H. & N. 454. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. And it seems to me that in the present case there is but one and the same cause of action, namely, that which I have already mentioned. It may be said that it would be more just and equitable in a case like the present that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage (if any), by a subsequent action, or, if need be, by a series of subsequent actions. The same might have been said in many cases in which, however, the contrary principle has for a very long time been, and, as I think wisely, acted upon. Take, for instance, the case of wrongful obstruction of light by means of the erection of a new building, lawful in itself. In that case it might be said the plaintiff ought to be allowed to recover the damage sustained up to the time of the commencement of his action, because, possibly, the obstruction may be removed, and therefore it would be unjust to permit the plaintiff to recover prospective damage unless and until it is actually incurred. If that principle were adopted, one consequence would be that the Statute of Limitations would cease to be operative. A plaintiff might lie by until the expiration of six years without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing. Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory words is *damnum absque injuria*, and consequently not actionable without special damage, just as the removal of the necessary support in the present case

was *damnum absque injuria*, and not actionable until the plaintiff's property was injured; but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action or a series of subsequent actions. The fact is that the principle hitherto acted upon—namely, that a plaintiff must recover once for all, by one and the same action, all damage, past, present, and future, resulting from one and the same cause of action—may not always insure perfect justice; but as a rule it is in my opinion, a wholesome principle, and I doubt whether any better could be devised. It may be that in some exceptional cases—such, for instance, as injury sustained by a passenger, owing to the negligence of the carrier—some useful change might be made in the law; if so, that is a matter for the Legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action. And it seems to me that anything more disastrous than that of allowing a series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived. If in the present case the reversioner must resort to successive actions for injury to his reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action. In my opinion, the plaintiff is entitled to judgment for £400 and one farthing and costs.

MELLOR, J. The facts of this case are set out in the judgment of my brother Manisty, and it is not necessary for me to repeat them. If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the lord chief justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form; but I think that this case is concluded by authority, and that I am not at liberty to treat the question as an open one. The plaintiff in this action complained that he was

damned in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his (the plaintiff's) premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner; and it is with regard to the latter head of damage that the question upon which we differ arises. It cannot be disputed, since the case of *Backhouse v. Bonomi*, 9 H. of L. 503, that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property; and no cause of action can arise to the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property until some actual damage has been thereby occasioned to his property. In the language of Lord Wensleydale in *Backhouse v. Bonomi*, *supra*: "The plaintiff's right is not in the nature of an easement, but the right is to the enjoyment of his own property, and the obligation is cast upon the owner of the neighboring property not to interrupt that enjoyment." The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The *damnum* and *injuria* both combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was lawful exercise of his right; but as soon as he, in the otherwise lawful exercise of his right, excavated in his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, *ipso facto*, became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of *injuria* and *damnum* which gives the right of action

to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant having become tortious, and whether he will bring his action immediately upon the manifestation of damage or wait for further development of it is at his option; but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts. The result is clearly established by the case of *Nicklin v. Williams*, 10 Ex. 259, which, although it must be considered as overruled by the case of *Backhouse v. Bonomi* so far as it decided that, under circumstances exactly like the present, the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case. Parke, B., in delivering the judgment of the court upon the argument on the demurrer in that case, said: "For this wrong the plaintiffs would have a right to recover a full compensation including the probable damage to the fabric; and if they had already obtained a verdict with damages they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong." The question in that case was distinctly raised by the new assignment, and was whether, on fresh damage arising after an agreement by way of accord and satisfaction had been made, a new cause of action could arise. That the case of *Nicklin and another v. Williams* was rightly decided, so far as it affects the matter now in controversy, appears from the judgment of the House of Lords in *Backhouse v. Bonomi*, in which the Lord Chancellor, Lord Westbury, referring to it, says: "With regard to *Nicklin and another v. Williams* the decision of that case is beyond all question; some of the dicta which have been relied upon by the counsel in that

case are not necessary for the decision that was there pronounced." I cannot see any distinction between the present case and that. In the present case the tortious act which occasioned the damage is identical in character with that in *Nicklin v. Williams*, and compensation for the resulting damage must be obtained by one and the same recovery. It might in the present case be a convenient course to wait and see whether further damage will actually result instead of assessing it as probable; but I can only consider that the same suggestion has frequently arisen and been constantly overruled as being inconsistent with an elementary rule of law. In *Bonomi v. Backhouse*, E. B. & E. 638, Wightman, J., says: "The plaintiffs can only recover to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage;" and Coleridge, J., at page 641, said: "Where a right of action is thus vested, and an action is brought for the act alleged to have occasioned the injury, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise thereafter, as well as those which have arisen; for the right of action is satisfied by one recovery." And in the same case in error, Willes, J., delivering the judgment of the Court of Error, commenting on *Nicklin v. Williams*, says: "For before the former action was commenced it is obvious that actual damage had been sustained; in which case another principle applies, viz.: that no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by one judgment or accord." I am unable to see anything in the present case to take it out of the rule so clearly established, viz.: that there can be only one recovery for all the damage resulting from the same wrongful act, whether it be all then manifest or is only likely to result from it; for it appears to me you cannot divide the injurious consequences into sections and refer each new damage as it occurs to some new tortious act by the defendant, there being in fact only one tortious act committed; and to stop at a given point, and so divide the damage

already accrued from the damage which may be still further developed, would be a violation of the rule as to one recovery or one award to which I have referred. If I am right in what I have said, that in every cause of action there must combine an *injuria* and a *damnum*, then I cannot doubt that the arbitrator was right in assessing not only the actual manifest damage, but also in assessing the future damage within the fifth and sixth paragraphs of the plaintiff's claim, and that consequently the plaintiff is entitled to the judgment of the court.

COCKBURN, C. J., dissented.

CURRENT EVENTS.

GERMANY.

DR. FORSTER.—The death is announced at Berlin, August 8, of Dr. Forster, an eminent privy councillor and ministerial director of the department of worship in the German ministry of ecclesiastical affairs. Dr. Forster stood in the first rank among Prussian lawyers, and had a European reputation for jurisprudence. A few years ago he occupied the post of judge in the Court of Appeals at Greisawald, when he was called to Berlin to take a high position in the ministry of justice. At the outbreak of the political struggle between Prince Bismarck and the ultramontanes, when Dr. Falk was placed at the head of the ministry of ecclesiastical affairs, he selected as his chief lieutenant Dr. Forster, to whom is due a great part of the credit or discredit of the celebrated "Falk laws," which are at the present moment the subject of negotiations between Prince Bismarck and the Roman nuncio. He also devised the recent religious legislation and defended the imperial religious policy in the Landtag.

GREAT BRITAIN.

Baron Blackburn, Lord of Appeal, Sir Robert Lush, Justice of the Queen's Bench, England, Judge Charles Barry, of the Court of Queen's Bench, Ireland, and Sir James Fitz-James Stephen, Q.C., the eminent jurist, have been appointed commissioners to consider changes in the draft of the penal code which was submitted at the recent session of Parliament, and to present the amended bill at the next session.

GENERAL NOTES.

A NEW EDITION OF BRACTON.—An important addition, says the *London Academy*, will shortly be made to the "Rolls Series" of chronicles and documents, illustrative of early English history, by the publication of the first volume of "Bracton de Legibus et Consuetudinibus Angliæ," which is now completed. Sir Travers Twiss, Q.C., has undertaken, at the request of the Master of the Rolls, and under the authority of the Lords Commissioners of Her Majesty's Treasury, to edit the work of the great "Father of the Common Law of England," which has been hitherto almost a sealed book to the law student from its scarcity, and from the repulsive character of the text of the printed book of 1569. It has been recently ascertained that there are about thirty-five ancient manuscripts of Bracton in England, of which more than twenty have been examined by the editor, and he has succeeded by a careful collation of the more important manuscripts in correcting many inaccuracies of the text of the printed book. The editor's view, as announced in his introduction to the first volume, is that Bracton's work was not originally composed in the form in which it has come down to us in the printed book of 1569, but that it consists of various treatises, composed at intervals by the author, and not written *uno tenore*, although ultimately consolidated into an aggregate work. This hypothesis serves to explain certain difficulties arising out of seeming conflicts of statement as to the law in different parts of the work, and it accounts for the variations which are found to exist in certain manuscripts in the mode in which the treatises are grouped under different heads, and are diversely arranged in books or in centuries.

THE CONDUCT OF JUDGES.—The *Chicago Legal News* expresses itself as follows on this subject: "How Judges should act in their intercourse with the Bar and general public is not regulated by any fixed rule. Some Judges mingle freely with the people, and even talk about the cases that are pending before them, while others imagine that there is a line drawn between them and the people, and exclude themselves from society as if it were an enemy to judicial purity. We have stated the two extremes. The former will never have the respect of the

Bar, while the latter will be regarded as too aristocratic for this country. The correct line of conduct is between the two extremes. Judges should mingle freely with the people. The more they know of the wants and necessities of the people, the changes that are taking place in the mercantile, and the improvements that are being made in the mechanical world, the better fitted they will be to decide the cases that come before them. They should, however, treat with contempt every attempt that is made by attorney, client, or other person to approach them out of court, to talk about or discuss the law or facts of any case that may come before them. Such talk or discussion can only properly take place in open court after notice to the opposite side. An attorney never feels safe if he hears that his opponent has been talking privately with the Judge who is to decide his case, about the issues involved. We are glad to be able to say that Judges are generally very careful in this respect, but regret to say that there are exceptions."

REPEAL OF THE BANKRUPTCY ACT.—*The Chicago Legal News* remarks: "Ever since it was known that the law would terminate on the first of September, the uncertainty as to who would avail themselves of the protection of the law has had a very depressing effect upon the business of the country. Among the many important questions that will come before the next Legislature of this State, will be what relief, if any, shall be extended to insolvents? Some will be in favour of a stay-law, while others will be in favour of a more liberal exemption of property from liability to execution and forced sale. Others no doubt will be in favour of a State Bankrupt law. Massachusetts has had a State Bankrupt law for many years; in fact the law now just expiring which has become so odious, was for the most part taken from the Massachusetts law. Vermontin, contemplation of the repeal of the United States Bankrupt Law, has recently passed a State Bankrupt Law, which is amongst the longest laws ever passed by that State. We doubt if the Legislature of this State, with the memory of the present Bankrupt law fresh in the minds of the people, will for some time to come pass a State Bankrupt law."

RIDING ON SUNDAY.—*The Albany Law Journal* says: In *Schmidt v. Humphrey*, 12 West. Jur.

475, decided by the Supreme Court of Iowa at its June (1878) term, the action was brought to recover damages for injuries received by plaintiff while travelling in a highway, caused by defendant's dog frightening the horse attached to the buggy in which plaintiff was riding. A defence set up was that plaintiff was at the time violating the statute forbidding riding on Sunday on secular business. The court held that this defence was not sufficient. This decision, while a sensible and just one, is in conflict with the doctrine laid down in numerous cases. In *Smith v. Boston & Maine R. R. Co.*, 120 Mass. 490; 21 Am. Rep. 538, it was held that one who travels on Sunday, to ascertain whether a house which he has hired, and into which he intends to move the next day, has been cleaned, is not travelling from necessity or charity and cannot maintain an action for injuries sustained at a railroad crossing through the negligence of the servants of the railroad company. But in *Wick v. Wesson*, 6 Gray, 505, where plaintiff and defendant were racing in the highway in violation of law, it was decided that one could recover for injuries caused by the negligence of the other; an action, however, would not lie in such case for an injury caused by a defect in the highway. *McCarty v. Portland*, 67 Me. 167. In *Cratty v. City of Bangor*, 57 Me. 423; 1 Am. Rep. 56, it is held that a person travelling on pleasure on Sunday cannot maintain an action against the town for injuries resulting from a defect in the highway. But in *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366, it was held that where plaintiff, who was travelling to see his children on Sunday, was injured by a defect in the highway, a recovery would not be defeated under a statute forbidding travel on that day, except for attendance at places of moral instruction and from necessity. In *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, it is held that one violating the statute prohibiting travel on Sunday is not without the protection of the law. A carrier of passengers who transports him owes him the same duty as if he was lawfully travelling, and is responsible for a violation of that duty. See, however, *Stanton v. Metropolitan R. R. Co.*, 14, Allen 485, where a different view is held. Also *Gregg v. Wyman*, 4 Cush. 322; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534, and notes to cases 3 Am. Rep. 368; 8 id. 366; 9 id. 544, and 21 id. 540.

The Legal News.

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CASES IN APPEAL.

The Court of Appeal at Montreal delivered a considerable number of judgments on Wednesday. A person unacquainted with legal business in this Province would be astonished to learn that there were two lower courts through which the cases arriving at this tribunal had been filtered. The impression would naturally be created that this was a court of original jurisdiction, and not the highest appellate tribunal of the Province. For among all these appeals, carried up to this court at considerable expense, and entailing long delays, there did not appear to be a single one which the learned judges deemed worthy of a considered opinion in writing, and there was hardly a single precedent cited. The appeals were disposed of in an off-hand manner, and in several instances upon purely equitable considerations. We do not pretend to impugn the judgments rendered; on the contrary, they seem for the most part unimpeachable. We merely remark the singular fact, which cannot but arrest the attention of those acquainted with the care bestowed on some of the judgments in the courts below, thus summarily overruled in appeal.

THE FRANKFORT CONFERENCE.

The sixth Annual Conference of the Association for the reform and codification of the Laws of Nations has been held at Frankfort, Mr. David Dudley Field having been chosen president of the Conference. According to the report of the Council there has been a satisfactory increase during the past year in membership and in the interest evinced in the proceedings of the Association. It is worthy of note that even China and Japan were not unrepresented. The envoy of Japan to the English Court delivered an address on the relations of the Asiatic nations to those of the West, in which particular reference was made to the subjects of trade and consular jurisdiction. He expressed the hope that in time the

commercial nations would recognise that, as regards Japan, it was their interest to submit to native jurisdiction. The ambassador from China had also prepared an address which was read by Mr. Jencken. Both of the essayists were added to the list of honorary vice-presidents of the Association. A discussion ensued on the Suez canal, and a resolution was passed to the effect that "this Association is of opinion that it is for the interest of the commerce of the world that the Suez canal and other similar international works should be declared by an international Act to be forever open, and free and exempt from hostile attack in case of war." Reports from Committees were received on the subjects of Bills of Exchange, Patent Law, General Average, Bankruptcy and Copyright. The subjects of collisions at sea, and the necessity of international concert to punish criminally the non-observance of the rules of navigation for the prevention of collisions, were considered and referred to Committee. Other papers treating on topics of international law were read, and the result of the meeting was considered generally satisfactory.

EXECUTIVE PARDON.

Applications are being constantly made to our Provincial Executive for reduction of punishment or for absolute pardon in criminal cases adjudged before the Provincial Courts, and upon this matter the following extract from an influential Provincial newspaper will not be out of place here. Referring to the application to the Provincial Executive in an extreme criminal case, in which the Executive had cast the responsibility upon the judge, it is said: "The Lieutenant-Governor has sounded the true note in saying that the Executive privilege of pardon should not be turned into a court of criminal appeal. It should only be brought into play where there has been a clear and admitted failure of justice, or error of a court, not capable of remedy in any other way, or where from some special reason it is made apparent to the head of the Government that mercy should be shown to a convicted person. But does the Lieutenant-Governor carry out this doctrine when he finally refers the matter in hand to the judge who tried the case, to see if he thinks that the man ought to be pardoned? Home secretaries in England have

fallen into this routine to escape responsibility, till people have come to consider a reference to the judge in such cases constitutionally orthodox, the proper course for the sovereign, or the holder of the sovereign's prerogative, to take. No position can be more illogical, unless on the assumption that the scheme of British justice is terribly faulty. If a judge is bound hand and foot to follow a routine so rigid that he is liable to give sentences that he himself feels to be unjust, there would be some sense in the idea of the executive officer asking him, "in the case of A or B did you give a just or an unjust decision?" But if it may be reckoned, that as a rule, a judge, at all events, thinks that the sentence he records is just, how can he do otherwise, when the executive power refers the pardon question to him, than say that he thinks his decision ought to stand? Nor can it be alleged, there are *nuances* of guilt that a judge may feel but cannot recognize in court. The theory of criminal law is, that statutes define punishments so broadly, leaving so wide a range of discretion to the court, that the judge is enabled to consider these *nuances* in passing sentence. True, the statutes, though they profess to be thus elastic, are often still a great deal too rigid; but then surely orthodox practice should bind a judge, constrained by a clumsy law to give a sentence he felt to be unjust, to take the initiative in seeking the executive pardon for the victim. The true character of the executive pardon emerges from these considerations clearly enough; it does not constitute the executive power a Court of Criminal Appeal, but it is safe to go further than this, and venture on something more satisfactory than a negative. The Royal pardon, of course, is first of all, an attribute of sovereignty, which, while sovereignty exists, needs no excuse for its arbitrary exercise, nor for its arbitrary denial. If its denial ever leaves an innocent man to suffer punishment, so much the worse for law, but that is another branch of the subject. In modern times, when political refinements aim at leaving sovereigns as little sovereignty as possible, the pardon becomes a means of letting off offenders whom the consensus of opinion—taking the place of the sovereign's personal fancy—is in favor of letting off. The difficulty of getting at that consensus is the torment of home secretaries.

Of course memorials are false guides—newspapers are almost equally so—faithfully representing public opinion only in respect to tendencies that can be estimated in reference to long periods of time, never in respect to individual incidents. All that the home secretary or Provincial Governor can do is to try and find out what the consensus of opinion ought to be and work on those lines."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 13, 1878.

JOHNSON, J.

MACDONALD v. Hon. J. G. JOLY et al., and
CHAUVEAU and PETERSON, *mis en cause*.

Injunction—Contempt—Railway.

Where an injunction, which *prima facie* appears to be legal and valid, has been issued by a judge of the Superior Court, and the parties to whom the writ was addressed have disregarded it, the Court will not consider an application to revise the order for injunction while the parties remain in contempt.

The Government of the Province of Quebec having adopted proceedings to take possession of the Montreal, Ottawa & Occidental Railway, Mr. Macdonald, the contractor for building the railway, who claimed a large balance due to him, obtained an injunction from a judge in chambers to stop the proceedings. This writ was disregarded by Mr. Peterson, the government engineer, whereupon a motion was made on behalf of the contractor that he be committed for contempt.

JOHNSON, J. In this case a motion to commit Peterson, one of the defendants, and also Mr. Chauveau, the Sheriff, for contempt in disregarding an injunction, was made and answered on Friday the 6th, and part of the answer then made by both of these gentlemen depended upon a question which they raised by a motion to revise the order of Mr. Justice Rainville upon which the injunction was issued; and the grounds urged for revising it were substantially that it had been improvidently issued, because the proceedings complained of in the petition for injunction were taken under an order of the Executive Council of the Province, made in pursuance of the authority given by the Provincial Act, 32 Vic., Chap. 15, having reference to the resumption, under certain circumstances,

of public works. The papers were put before me the following day (Saturday), and I had but a very short time to look at them, and on Monday I requested the counsel to speak to a point that had presented itself to me, and counsel were heard upon that point the day before yesterday. I have now, therefore, to give judgment on the motion for contempt and on the answer that is made to it; and first as to the motion to revise the order for injunction: I am of opinion that that motion cannot be granted, and therefore that that part of the answer made to this proceeding for contempt fails. I do not regret the discussion that took place the day before yesterday as to whether the act of 1869, c. 15, gave the Provincial Government power over any but Provincial works, because too much light cannot be thrown upon so important a subject; but I observed to counsel then, and I must observe again now, that I am concerned only at present with the proceedings for contempt; and as regards the question whether a contempt has been committed, it is immaterial whether a good defence can ultimately be made to this injunction or not, the question at this moment being only whether this order, on the face of it, is such a nullity (as a necessary conclusion from what is alleged in the Petition) that it could be treated as if it had no existence; because if the learned Judge saw on the face of this petition that it was averred, and sworn to, as it undoubtedly was, that the Company from which the Quebec Government purchased being a Federal corporation had no power to sell, and the Quebec Government no power to buy; and if he further saw, as he might have seen, that in another case to which the Quebec Government was itself a party, it had been held that they had nothing, at the very utmost, but proprietary rights in this railway after it had ceased to be a Provincial work, and had changed its character into a Federal railway, it will hardly be contended that, under such circumstances, he ought not to have granted the injunction; indeed, it appears plain that the learned Judge, who is known to be one of the most accurate and painstaking judges on the Bench, would have violated his duty if he had refused it; for, after all, whether Mr. MacDonald's asserted rights ultimately prevail or not was not the question; whether those rights involve, as he asserts, over a million of dollars,

or whether it ultimately turns out that he has nothing to lose, makes no difference. There was one right that he clearly had when he asked for that order—a right common to the wealthiest contractor and the humblest laborer on the line, both exactly to the same extent, neither more nor less,—and that was the right to be heard, and to have his case heard, and to make those of whom he complained come and answer him, and show their right, if they had any; and he got that right acknowledged, and properly acknowledged; and those to whom the injunction was addressed might have come and answered him, and have exercised their undoubted right also of being heard; but, instead of that, it is asserted that they set themselves above the law, and therefore the question now is whether this was a legal injunction *prima facie* to be regarded and obeyed, or whether these gentlemen, without giving themselves the trouble to come and answer it at all, could disregard and disobey it,—in one word, whether the authority of the Queen, conveyed in the usual form of a writ, under the seal of her Court, can be overpowered by the mere brutal assertion of force. I say that is the question now, and so on the clearest grounds it is the question, if there is to be in this country such a thing as liberty under the law. It is, indeed, conceivable that the rights of the executive administering different departments of the Government for the public may have been vested in them in a different form, as regards the mode of their exercise, from those of individuals; but the exercising of those rights must be subject to the law of the land, and it appears to me that in a country possessing at least some of the essential forms of the English political constitution, it ought to be obvious to every one that there is and can be no power that is not in some shape amenable to the law, or that can venture, at least as far as the instruments of that exercise are concerned, to set the supreme authority of the law at defiance. It is clear therefore under this view of the case, that it would be equally premature, at this moment, to say anything as to the ultimate validity on the one hand of this writ of injunction, or on the other of the Lieutenant-Governor's warrant that may be opposed to the injunction on the merits. All we are concerned with now, having once

ascertained the legal existence of the writ, will therefore be the facts that constitute the contempt complained of, and those that constitute the answer to it. These facts are, as far as the sheriff is concerned, distinctly traversed; and I think fairly and successfully traversed. All that was done by that officer was done previously to his getting notice of the requirements of the writ. In Mr. Peterson's case, however, the matter stands very differently. He does not traverse the facts at all; but merely justifies them by setting up the warrant and saying that he acted in obedience to it. As far as regards Mr. Chauveau, therefore, the plaintiff will take nothing by his motion for contempt against him and it will be dismissed, but without costs. In the case of Mr. Peterson, though I have said, and still say, that as a matter of law his position is a very grave one, I should be sorry to believe that that was the light in which the matter presented itself to him, for he says he acted under advice, and the circumstances were undoubtedly such as would impose upon him. Although, therefore, he may be without excuse in law, there may have been much to excuse him in point of fact, and the judgment I am about to give is one that will be suited to the singular circumstances of the case. This gentleman seems to have had everything on his side except the law, and that was clearly against him. The law is supreme, and, unless we are in a state of anarchy, it must be so held and regarded by all men, and they can only disregard it at their peril. The law, in this case, received its clearest expression in the terms of the writ that Mr. Peterson had seen, and that writ told him and all concerned to stop for the present, and to come before the Court and make proper answer to it, where they could be heard and their rights decided. It cannot, in a civilized community, admit of doubt that it was Mr. Peterson's duty to obey this writ. The judgment of the Court upon this motion is, that Peter Alexander Peterson is adjudged guilty of contempt; and, as regards the punishment for his offence, the Court reserves to itself to pronounce hereafter, and it is further ordered that he enter into his own recognizance in the sum of \$1,000, to be and appear in his own proper person before this Court whenever he shall be called upon by a twenty four hours' notice in writing so to do—

then and there to receive the judgment of the Court in his own person, or (if he shall make default to appear) in his absence—and that he pay the costs of the present motion.

Carter, Q.C., representing the Government, took exception to the judgment dismissing his motion to revise the order, and intimated that an appeal would be had.

Doutre, Q.C., for Macdonald.

Carter, Q.C., for the Quebec government.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TREASIER, and CROSS, JJ.

MACDONALD v. JOLY et al.

Injunction—Contempt—Appeal.

Held, that a party seeking relief from an injunction, and whose motion to dissolve it has been rejected by the lower court, may, in the discretion of the court, be permitted to appeal, though he appears to have disregarded the injunction and to be in contempt of court.

This was a petition to be permitted to appeal from the judgment reported above.

RAMSAY, J., dissenting, remarked that as a general rule it would be extremely inexpedient to grant lightly an appeal in a proceeding of a summary character, and here there had been brought to the knowledge of the court another matter which should prevent it from passing at this time upon the question. It appeared that this writ of injunction had been absolutely set at defiance by the persons to whom it was addressed. They had not obeyed the writ, and so long as they had not obeyed the writ, it appeared to him that they had no right to appeal or proceed upon the original suit. The authority for this was very ancient. It was to be found in Comyns's Digest under the words Chancery and Injunction. The rule was laid down in the most express terms. The first thing to be done was to obey the order of the Court, and however illegal the order might be it must be obeyed before the party seeking relief from it could come into Court and take any proceeding whatever. His Honor was under the impression that unless this rule was adhered to, parties would frequently delay to obey the orders of the Court, and appeal to avoid compliance. He did not feel

called upon at this stage to express any opinion upon the legality of the proceeding adopted here by the Government.

MONK, J., also dissented, considering it irregular that a motion of this description should be made to dissolve an injunction when the same grounds were taken in a *défense en droit*. His Honor thought the appeal should be refused on the ground that it was one of those judgments that could be remedied by the final judgment, and to allow an appeal would be to defeat the object of the injunction.

DORON, C. J., after referring to the terms of the contract between Macdonald and the Government, proceeded to say that long after the time when the contract was to be completed, there was a dispute between him and the Government as to the amount due. Macdonald claimed that there was a large amount due him. He admitted that the works were not completed, but he alleged that this was the fault of the Government, which did not allow him to complete them. The petitioner went on to say that an order in Council had been passed, and that the Government were going to dispossess him of the road. He alleged that this would be an injury to him, and he asked for a writ of injunction, saying that Peterson, the engineer, had given a notice interfering with his possession, and he prayed for an injunction to prevent interference with him until the works were completed and paid for. So the petition was that of a contractor who said: "I have got your property, your railroad; I contracted to give it over in a certain time, it is not completed; I will keep it until it is completed, and I will get an order to prevent any interference with me because I am not paid for my work." If Macdonald might do this, the contractor for building or repairing a house might do it. He might say, "I will keep your house until I have finished the work." It was an important point, whether a man, not alleging any title, could have a right of this kind against the proprietors: the question was so novel that it deserved to be looked into. It might be said the injunction was a remedy of an extensive kind; but on this account it was liable to abuses. Story says it ought to be granted with extreme caution, and to be applied only in extreme cases. This case was of great importance, affecting a long line of railway. The in-

junction, moreover, had been granted without any notice to the adverse party. But the only thing the Court had to look to at present was this: Was there something on the face of the proceedings that deserved to be inquired into, to see whether this contractor had a right to keep the property as long as he had not completed his contract? The majority of the Court thought that was a very important question, and one which might properly be brought to the Court of Appeal, but this Court was not going to suspend the proceedings in the Court below. At present the only question was this: was the question submitted by the motion to dissolve the injunction of sufficient importance to deserve an appeal? It might be said that this could be remedied at the final judgment, but an important injury might be sustained before a final decision was arrived at, perhaps ten years hence. Therefore, the Court considered that it was one of those cases in which the parties should be heard. The judgment here would not affect the proceedings in the Court below for the execution of the injunction, which must be executed in the meantime. The judgment of the Court simply went this far: a motion was made to dissolve the injunction; that motion was rejected, and this Court considered that there was enough to authorize the Court to take notice of that judgment. It might be said the granting of the injunction was in the discretion of the Court, but this was rather an extraordinary case, for which no precedent had been adduced, of such a writ being addressed to such officers of the Government.

CROSS, J., remarked that it was a case of great importance, and there could not be much doubt that it was a case in which the Court had a right to grant an appeal. He wished to say a word with reference to the reason given by Mr. Justice Ramsay. Suppose there had been no motion to dissolve the injunction, and that there had been a motion to attach Mr. Peterson for contempt. If Mr. Peterson had presented a petition to this Court to be relieved from the judgment, this Court would have said, "You are in contempt of Court; you must purge yourself of that contempt, and we will not interfere until you have done so." Even in such case, this Court might interfere if it saw a glaring error in the judgment. But here, the case was different, the party said, "We have made in

good faith a motion to dissolve the injunction, and we have had an adverse judgment on that motion. We conceive that we are aggrieved by the judgment of the Court below, and we desire to appeal." The authorities cited by Mr. Justice Ramsay showed that the Court below was entitled to see that its order was obeyed before any other proceeding was allowed; but the incident of a proceeding for contempt was not to prevent the Court of Appeal from interfering with the question raised.

Appeal allowed.

JONES (def. in the Court below), appellant;
and THE MONTREAL COTTON CO., (plffs. below)
respondents.

*Company—Subscription—Conditions—Payment of
Calls.*

The defendant subscribed for stock in a Company about to be formed, and received a letter from the secretary stating that his stock was taken on the same condition as that subscribed by three persons whose names preceded his on the book, and who had appended the condition to their subscription that the company was to be a hydraulic company. The defendant did not append such condition. The hydraulic company was not formed, but a cotton mill company only. *Held*, that the defendant having signed the book unconditionally was not entitled to be relieved from liability for calls.

RAMSAY, J., said the action was brought by the Cotton Company, claiming \$750, calls on stock. The answer of Jones was that he never agreed to become a shareholder in the Cotton Company, respondents. It appeared that there were two schemes which were being promoted at the same time—one for organizing a company to turn to account certain water powers, and the other for working a cotton mill simply. Jones did not wish to take any part in a cotton company, but only in the hydraulic scheme for turning to account the water privileges. Certain other persons were of the same opinion as Mr. Jones; viz., Messrs. Brydges, Cramp and Thomas, and when they took their stock, they distinctly entered on the subscription list that they would not take any share in the cotton company. Mr. Jones was of the same frame of mind, but whatever may have transpired between him and the Secretary Mr. Hobbs, it appeared that Mr. Jones wrote down his name without any restriction. Only the cotton company was formed, and Messrs. Brydges, Cramp

and Thomas representing that this was a violation of the conditions, were relieved from their stock. Mr. Jones was in a different position. He had not written anything on the list to qualify his subscription; all that he could produce was Mr. Hobbs' letter, that he had taken stock on the same condition as Messrs. Brydges, Cramp and Thomas. On this he claimed to be exonerated too, but it appeared to the Court that the position of the two parties was totally different. It was competent for the company to exonerate Messrs. Brydges, Cramp and Thomas; but even if they were improperly relieved, Mr. Jones could not avail himself of that. He might have some action against these gentlemen, charging that they had been improperly exonerated; but it was no answer to the present action, asking him to pay his own stock. The sole question here was, what was the position of Jones? Had he bound himself to pay for his stock if the hydraulic scheme was left out? The Court thought he had. The judgment maintaining the action would, therefore, be confirmed.

Davidson & Cushing for Appellant.

Lunn & Davidson for Respondents.

ELLIOTT *es qual.* (plff. in the court below) appellant; and THE NATIONAL INSURANCE CO. (defts. below) respondents.

Insurance—Insolvency—Transfer—Notice.

An official assignee, after receiving an assignment of an estate, insured the stock, making the loss, if any, payable to the estate. The creditors subsequently elected another assignee who, on a loss occurring, claimed under the policy. *Held*, that the insurance passed to the new assignee without notice to the Company.

DORION, C. J., said one Coté, a merchant tailor at St. Johns, had failed, and on the 1st May, 1878, assigned his estate to Mr. Auger, official assignee. On the 6th May Mr. Auger effected an insurance for \$3,000 on the stock, the loss to be payable to the estate of C. H. Coté (the insolvent.) In the course of time the creditors met and appointed the present appellant as assignee to the estate. A loss occurred, and in consequence of the loss the present action had been brought by Elliott as assignee to the estate. The Company pleaded several pleas, alleging that there had been a change of possession by the appointment of a new assignee, and, in the second place, that Coté was declared to be the occupant of the premises, but was

not in occupation of the store either at the time of the insurance or at the time of the fire. The principal question was this: After the estate was transferred, did the insurance inure to the benefit of the new assignee without notice to the Company? The Court below held that it did not, and dismissed the action. As to the occupation, it appeared that Coté continued to occupy the dwelling above the store up to the 1st May, the store being closed. The Court was, therefore, of opinion that the description was a correct one, and there could be no doubt that the agent at St. John's who took the risk knew all the facts. Under these circumstances the Court was of opinion that Auger, as official assignee, insured in his official capacity for the estate, and he provided for the case in which he should cease to be assignee, and made the insurance payable to the estate. The judgment below, which dismissed the action, must, therefore, be reversed.

Davidson & Cushing for appellant.

Lunn & Davidson for respondents.

CONTRIBUTORY NEGLIGENCE.

[Continued from p. 437.]

Nicholson v. Erie Railway Co., 41 N. Y. 525.—The deceased was killed by defendants' cars while he was crossing their track. The track in question was a branch from their main track, into the premises of an iron company, and was jointly owned by the defendants and that company. The deceased had shortly before been in the employment of that iron company, and with other of the employees had been in the habit of crossing the branch track, without objection, on his way to and from his home. On this occasion he was holding down his hat to shield his face from a storm. Some coal cars of defendants, which had been standing on the branch track, without having their brakes set, were started by the wind, and driven up a slight acclivity, struck the deceased and killed him. He could have seen them by looking, as they were only two feet from him as he stepped on the crossing, but he did not look. The judge charged that it was the duty of defendants to set the brakes; there was a verdict for the plaintiff, which was now set aside.

Three opinions were delivered—by Smith, Earl, and Lott, JJ. Judge Smith held that the

defendant owed the deceased no active duty, as he had no legal right on the premises. Judge Earl held the same substantially, except that he thought the deceased was lawfully on the premises, but added that at all events they were bound only to the exercise of ordinary care, and were not negligent under the circumstances. Judge Lott held that the deceased was guilty of contributory negligence, and gratuitously added his opinion that the defendants owed the deceased no active duty. With these three judges three others voted for reversal, and two were for affirmance.

Remarks.—This would seem to be a clear case of contributory negligence, and for a nonsuit, if there ever was one, but the reversal seems to have been put on the ground that the defendants owed deceased no duty to set the brakes. The three judges who wrote, and Judges Grover and Ingalls voted on this ground; Judge Sutherland was for reversal on the ground of misdirection, and that it was a question for the jury whether the omission to set the brakes was negligence; Judges Lott and Grover also held that the contributory negligence was fatal to a recovery.

Harty v. Cent. R. R. Co. of N. J., 42 N. Y. 468.—The deceased was walking along the track, not at a crossing, and stepped from one track to another, to avoid a coming train, and was killed by another coming up behind him. By looking he could have seen the danger, and he was familiar with the locality, and it was unnecessary for him to stand on the track. Held, first, that the defendants were not guilty of negligence, and second, that the deceased was guilty of contributory negligence.

Lannen v. Albany Gas-light Co., 44 N. Y. 459.—Plaintiff was an infant. A leak had been caused in a gas-pipe in a house, owned by her father and occupied by him and others, by a tenant's piling coal against the pipe. An employee of defendants, sent by them to repair, lighted a match in the cellar and caused an explosion which injured plaintiff. There was no proof of any negligence on the part of plaintiff or her father, but even if there had been, the court said it was not contributory, for the mischief was caused solely by the negligence of defendants' servant.

Barker v. Sasage, 45 N. Y. 191.—Plaintiff, a lame woman, 64 years old, was crossing a street

in the city of New York, at 10 o'clock in the forenoon, and the driver of a cart, going at the rate of 4 miles an hour, when at a distance of twelve feet from her, called to her, which call was heard by more distant persons, but she kept on and was run down and injured. Held, that a charge that the plaintiff was only required to look ahead along the crossing, and if in so looking she discovered no obstacle, she was not negligent in proceeding to cross, was error.

Gorton v. The Erie Railway Co., 45 N. Y. 660, reiterates the doctrine of the *Havens* case and the *Wilcox* case.

Downs v. N. Y. Cent. R. R. Co., 47 N. Y. 83.—Plaintiff, an infant, twelve years old, traveling with his mother on defendants' cars, and unable to find a seat in the car with her, by her permission went into another car, and remained there until the train reached a station; in his effort to return to his mother he received an injury. Held, that the mother's conduct was not *per se* negligent.

Ihl v. Forty-second St., etc., Railroad Co., 47 N. Y. 317.—A child, three years old, was killed while crossing defendants' track unattended save by a little child nine and a half years old. If the deceased exercised due care, and defendants were negligent, the defendants would be liable without regard to the parents' negligence; and negligence in so young a child, when the parents and attendant were not negligent, would not absolve the defendants.

Davis v. N. Y. Cent., etc., Railroad Co., 47 N. Y. 400.—This was a case of conflicting evidence as to the negligence of the deceased in approaching a crossing. A nonsuit was set aside. The court held, substantially, that a traveller, in approaching a railroad crossing, is required to make a vigilant use of his senses to ascertain if a train is approaching, and if by such use of his faculties, while approaching, the approach of a train may be discovered in time to avoid a collision, an omission to exercise them is such contributory negligence as will bar a recovery for an injury from a collision. But the traveller is not bound to stop, or leave his vehicle and go upon the track, or stand up in his vehicle and go upon the track in that position, in order to get a better view.

Madden v. N. Y. Cent., etc., R. R. Co., 47 N. Y. 665.—A refusal to charge "that if the jury be-

lieved that the deceased, before she reached the track, saw the approaching train, and notwithstanding this, went upon the track, where she was hit by the car, she was chargeable with negligence and could not recover," was held error.

Filer v. N. Y. Cent., etc., Co., 49 N. Y. 47.—

The plaintiff desired to leave the defendants' train at Fort Plain, where it is advertised to stop; the train did not stop entirely, and while it was moving very slowly, she was directed by a brakeman to get off, and told by him that it would not stop or move more slowly; another passenger got off safely; she followed and was injured. Held, that the question of her negligence was a proper one for the jury. A new trial was granted.

On a new trial, there was conflicting evidence whether the direction to get off was by a brakeman or by a person not connected with the running of the train. The judge charged the jury that this was immaterial; that it was for them to say whether it was prudent for her, acting under the advice of anybody, to attempt to alight. Held, error; that if the direction had been given by an employee she had a right to assume that it was safe to attempt to leave the train even while it was under way, but not so if it was given by another passenger. (59 N. Y. 351.)

On a third trial, the evidence as to whether the person in question was an employee of defendant or not was still conflicting, and it was held properly submitted to the jury and a verdict was sustained. (68 N. Y. 124.)

Phillips v. Besselaer, etc, Railroad Co., 49 N. Y. 177.—Plaintiff attempted to get on a train slowly passing the station where he had bought a ticket; the name of the station was called by some one on the train; others were getting on, and the plaintiff and others had got on and off at this station while the train was in motion; the steps being full of passengers, a jerk of the cars threw him off, and he was injured. Held, that he was negligent, and a nonsuit was sustained. The chief judge dissented.

Cosgrove v. Ogden, 49 N. Y. 255.—It is not negligence *per se* for a parent, living on a quiet street where few vehicles pass, to permit a child six years old to go unattended upon the street. It is a question for the jury.

Silliman v. Lewis, 49 N. Y. 379.—A want of

proper lights upon the plaintiff's vessel, which so deceived defendant that his vessel ran into the plaintiff's, would be such negligence on the plaintiff's part as to prevent a recovery, unless the defendant knew the true facts and with reasonable care could have avoided the injury. In this case as there was some evidence to repel the presumption of the effect of the plaintiff's negligence in not having proper lights, a nonsuit was set aside.

Keating v. N. Y. Cent., etc., Co., 49 N. Y. 673.

—Plaintiff attempted to get on a train standing at a station, not from the station platform, but from the opposite side of the train, where passengers frequently got on and off to the knowledge and without any objection on the part of defendants' employees. As she stepped on the car, the train started with a violent jerk, throwing her off, and injuring her. Held, that the question of her negligence was for the jury.

Hasman v. Hoboken, etc., Co., 50 N. Y. 53.—

Plaintiff, endeavouring to go upon defendants' ferryboat, and obliged, in consequence of the crowd coming off, to stand upon the stringer separating the foot passage from the carriage-way, was injured while in that position by the defendants' negligence. It was held to be a question for the jury whether the plaintiff was negligent in occupying such a position.

Eaton v. Erie Railway Co., 51 N. Y. 544.—A

train of cars was standing upon the defendants' track partly on a crossing, and the plaintiff wished to pass with his team, there being room to do so. Some person, not an employee of defendants, whom he asked if he could pass, told him he had better not pass. After waiting a few minutes he attempted to lead his horse across, when the train, without any warning, backed up and injured the horse and wagon. Held, that the question of contributory negligence was for the jury.

Maginnis v. N. Y. Cent. etc., Co., 52 N. Y. 215.

—Deceased attempted to cross a street in the evening. A long train, without any lights in the rear, was backing down, but had so nearly stopped that no motion was perceptible, and she then attempted to cross, when without warning the brakes were let off, and the train ran against her. Held, that it was a question for the jury whether she was negligent.

Totten v. Phipps, 52 N. Y. 354.—Deceased

was lessee of the third floor of defendants'

building, the lower portion of which was used and occupied by defendant. In the hall leading from the outer door to the stairs was a hatchway, closed by a trap-door, occupying nearly the whole passage, used and kept open by defendant in the day-time, but usually closed at from 6 to 8 o'clock P. M. Deceased went to the premises at between 8 and 9 o'clock P. M. without a light, and the trap-door being open, fell through it. The court held that whether she was negligent was a question for the jury.

Hackford v. N. Y. Cent., etc., Co., 53 N. Y. 654.

—The court held that in an action to recover damages for injuries received at a railroad crossing by a traveller on a highway, if some act or omission, on the part of the person injured, which of itself constitutes negligence, is established by undisputed evidence, it is the duty of the court to nonsuit; but if the fact depends upon the credibility of witnesses, or inferences from the circumstances, about which honest men might differ, it is a proper question for the jury.

Spencer v. Brooklyn City Railroad Co., 54 N.

Y. 230.—Plaintiff was a passenger on defendants' sleigh, and the seats being all taken, stood on the side foot-board upon which passengers usually stood when the seats were occupied. While in this position he was injured by a passing vehicle. Held, a proper case for the jury.

Bellon v. Baxter, 54 N. Y. 245.—Plaintiff

desiring to cross a street in the city of New York, saw a car approaching rapidly, and behind it a cart approaching in the track still more rapidly, and calculating that he could cross before the cart could get up, he attempted to cross in front of the car, and did pass, but was struck by the cart. Held, negligence *per se*. (This was in the Commission of Appeals.)

The case was re-tried and came before the Court of Appeals, in 58 N. Y. 411, and on evidence somewhat different, it was held a proper case for the jury. The only difference was that the plaintiff testified that he watched the cart till he lost sight of it; and he did not suppose it would turn off the track, and come ahead of the car on the other side quickly enough to catch him, as it was evident it did.

Remarks.—This seems a distinction without a difference. In both cases the plaintiff mis-

calculated. The only difference between the decisions is, that the Commission say, that as matter of law he had no right to rely on his "calculations," and the court say it is for the jury to determine that question. We suppose a man must "calculate" his chances in nearly every case of crossing a crowded street. If he did not, he never would get across, but would, like the timid saints in the hymn, "stand lingering on the brink." He must have a right to take his chances on such a "calculation." Whether he acts reasonably in so doing is a question of fact, not of law, and the Court of Appeals merely sought a polite way of differing from the Commission.

McCall v. N. Y. Cent., etc., Co., 54 N. Y. 642.

—The deceased was riding in a covered carriage with another person who was driving, near Suspension Bridge, at a point where the railroad track crosses the highway at an acute angle. The carriage and a train were going in the same direction. The driver was familiar with the locality, and knew he was in proximity to railroads, but was not aware of this particular crossing, nor thinking of the railroad at all. He heard a rumbling sound; did not know whether it was the falls, or what; looked around and saw nothing; just then saw the track within ten feet, slapped the horses with the reins, they started on a gallop, and the train struck the carriage. These facts were held to constitute contributory negligence.

Morrison v. Erie Railroad Co., 56 N. Y. 302.—Plaintiff, 12 years old, with her parents, being a passenger on defendants' train, desired to stop at Niagara Falls; it was dark; the conductor announced the station, and the cars stopped, but before the party got off, the cars started and moved slowly past the platform, when the father, taking plaintiff under his arm, stepped off, fell, and the plaintiff was injured. Held, that plaintiff was chargeable with contributory negligence, as matter of law. Two judges dissented.

Reynolds v. N. Y. Cent. & E. Co., 58 N. Y. 248.—Deceased, an intelligent lad, 13 years of age, was going home from school, about noon, and when last seen alive was going toward the tracks where they crossed the highway, and about one hundred feet therefrom. He was familiar with the crossing, passing over it daily, and with the times of the trains. Soon

after this two trains passed each other near this crossing, and immediately after the boy was found dead in the cattle guard. The day was clear, and ten feet from the crossing, in the highway, the train by which it appeared he was struck could be seen 750 feet distant. No signal of the approach of the train was given. The proof was held insufficient to sustain a verdict for the plaintiff, because it did not warrant a finding that the deceased was not negligent.

The court remark: "Doubtless the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death, but that men are careless and subject themselves thereby to injury, is the common experience of mankind, and when injured no presumption exists in the absence of proof that they were exercising due care at the time."

Remarks.—At first sight, it would seem difficult to reconcile this with the *Johanson* case. 20 N. Y. *supra*. But it is distinguishable, probably, by the fact that the conduct of the defendants, in the latter, was of so dangerous a nature as to justify the inference of care on the part of the deceased.

Weber v. N. Y. Cent., etc., Co., 58 N. Y. 451.—It is here held, that if the "negligence of the plaintiff in such action, contributing to the injury, clearly appears from all the circumstances, or is established by uncontroverted evidence," it is the duty of the court to nonsuit. "But if a finding by the jury that the plaintiff was free from the charge of negligence could not be set aside as wholly unsupported by evidence, although the evidence might be slight, and the question doubtful, a nonsuit would be improper." The court quote with approval the language of Judge Selden, in *Bernhard v. Renss. & S. R. R. Co.*, 1 Abb. Ct. of App. Dec. 131: "If it is necessary to determine, as in most cases it is, what a man of ordinary care and ordinary prudence would be likely to do under the circumstances proved, this, involving as it generally must more or less of conjecture, can only be settled by a jury."

McGrath v. N. Y. Cent., etc., Co., 59 N. Y. 468.—Where a railroad company has been accustomed to keep a flagman at a crossing, the fact of his absence does not excuse a traveller

on the highway from using his senses to detect the approach of trains. He has no right to interpret his absence as an assurance of safety.

Remarks.—Another feature of the *Ernst* decision is here disapproved.

Salter v. Utica, etc., Railroad Co., 59 N. Y. 631.

—Held, that where the severity of the weather requires a traveller upon the highway to protect himself from it, as for example by ear laps and tippet, if the means adopted impair his ability to detect danger, and he be injured at a railroad crossing, he is not absolved from the charge of negligence; but unless it is certain that the means used had that effect, it is a question for the jury.

Thurber v. Harlem, etc., Co., 60 N. Y. 326.—A boy 9 years old, with two other lads, on his way to school, attempted to cross a horse railway, and was injured by a car. The other two passed safely, and he passed one horse and was hurt by the other. Held, a case for the jury.

The court held that the degree of care required from an infant of tender years, the omission of which constitutes negligence, is entirely different from that required of an adult. It is to be measured in each case by the maturity and capacity of the individual, the law exacting a degree of care proportionate to that. An error of judgment does not condemn the act as rash, or even negligent. It is for the jury to say whether a person of ordinary prudence and discretion might not, under the circumstances, have formed and acted under the same judgment.

Carr v. N. Y. Cent. Co., 60 N. Y. 633.—The evidence showed due care on the plaintiff's part in looking in one direction and waiting till a train had passed; whether he exercised due diligence in looking the other way, was doubtful; yet it was held a proper case for the jury.

Ponlin v. Broadway, etc., Co., 61 N. Y. 621.—Plaintiff was leaving a street car, and as she put one foot to the ground, her hoop-skirt caught on a projecting nail in the platform; the conductor started the car at this instant, and she was thrown down and injured. Held, that she was not, as matter of law, negligent in wearing a hoop-skirt; that it was not, as matter of law, unnecessary; and that a lady, thus attired, is not, as matter of law, bound to be extra careful in managing her "train."

CURRENT EVENTS.

UNITED STATES.

DAMAGES AGAINST A CITY FOR ICY SIDEWALKS.

—In *Dooley v. City of Meriden*, 44 Conn. 117, the action was brought against a city for injury received by slipping on an icy sidewalk, which the city had neglected to keep free from ice. For about thirty-five feet along the sidewalk in question there was ice upon the sidewalk, and had been for about a week before the injury complained of happened. The sidewalks on each side of this one were free from ice, but no attempt had been made to clear this one, although after the ice was formed the weather was so mild that this could have been done by the most easy methods. The court held that the city was liable for the injury. In *McLaughlin v. City of Corry*, 77 Penn. St. 109; 18 Am. Rep. 432, it is held that while a municipality cannot prevent the general slipperiness of its streets, caused by snow and ice during the winter, it can prevent accumulations of snow and ice in the shape of ridges and hills. It is, therefore, liable for personal injury from such accumulations, happening to one without fault of his own, and if the obstruction is one of such long continuance as to be generally observable, the city would be charged with constructive notice thereof. In *Collins v. City of Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200, the plaintiff was injured while passing along a street in the defendant city by a fall, caused by an accumulation of snow and ice on the sidewalk, and it was held that defendant was liable. See the elaborate note to the last-mentioned case in 7 Am. Rep. 206, where the various authorities are collected and compared. The leading case upon the subject is *Providence v. Clepp*, 17 How. (U. S.) 161. Here it was held that it is the duty of a city under a statute requiring it to keep its highways safe and convenient, after a fall of snow, to use ordinary care and diligence to restore the sidewalk to a reasonably safe and convenient state.

THE GIFT OF A CHECK.—In *Simmons v. Cincinnati Savings Society*, 31 Ohio St. 457, the mother of plaintiff, who was lying sick at plaintiff's house, desired to give plaintiff about three hundred dollars which she had on deposit with defendant. To effect this object, she

signed and delivered to plaintiff a check on defendant for the amount of the deposit. Before the check was presented the mother died. The court held that until the check was paid or accepted the gift of the money it represented was incomplete, and that the death of the maker operated as a revocation. In *Jones v. Lock*, L. R., 1 Ch. 25, a father put a check into the hands of his son nine months old, and said he gave that to the child for himself. Afterwards he said it was his purpose to give the amount of the check to the child. After his death the check was found among his papers and it was held that there had been neither a gift nor a valid declaration of trust. It is stated in 1 Pars. on Cont. 237, to be the prevailing rule that the donor's own note or his own check or draft, not accepted or paid before his death, does not pass by gift *causa mortis*. But it has been held the delivery by a dying husband of the book of a savings bank, showing deposits by a deceased wife, with a verbal gift thereof, passed to the donee the moneys so deposited. *Tillinghast v. Wheaton*, 8 R. I. 536; 5 Am. Rep. 621. See, also, to the same effect, *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39. Bank notes may be the subject of a valid *donatio causa mortis* (*Hill v. Chapman*, 2 Bro. Bk. 612) and probably the written promises of others than the donor may be so, although it is said that the rule on this subject can hardly be considered settled. See *Miller v. Miller*, 3 P. Wms. 356; *Bradley v. Hunt*, 5 G. & J. 54; *Parish v. Stone*, 14 Pick. 207; *Bank of Republic v. Millard*, 10 Wall. 152; *Second Nat. Bank v. Williams*, 13 Mich. 282; *Hewitt v. Kays* L. R., 6 Eq. 198. In *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313, it was held that an assignment of shares in a bank would vest the same in the donee, although the shares were not transferred on the books of the bank before donor's decease.

ENGLAND.

PARTNER ENGAGING IN OTHER BUSINESS.—In *Dean v. MacDowell*, 38 L. T. Rep. (N. S.) 862, the English Court of Appeal held that if profits have been made in any other business by a partner in violation of a covenant not to en-

gage in any other business, the profits will not be decreed to belong to the partnership unless they have arisen, (1) from employment of the partnership property, or (2) from transactions in rivalry with the firm, or (3) from some advantage obtained by the partner by virtue of his being a member of the firm. In all other cases of breach by a partner of a covenant not to engage in any other business, the only remedy of the aggrieved co-partners is by an action for an injunction or a dissolution of the partnership; or, after the expiration of the partnership, by action for damages. In this case, the plaintiffs and the defendant entered into business as salt merchants and brokers, and by the articles of partnership mutually covenanted not to engage alone or with any other person, directly or indirectly, in any trade or business, except upon the account and for the benefit of the partnership. Two years before the expiration of the partnership, by lapse of time, the defendant purchased the business of a firm of salt manufacturers, and kept the matter secret from the plaintiffs, putting his son into the business so purchased till the expiration of the partnership, when the defendant openly entered into the business of salt manufacturing, which was carried on in the name of the firm from which he had purchased it. The salt manufactured by the latter firm continued to be sold on commission by the plaintiffs' firm till the expiration of the partnership, from which time the defendant sold the salt himself, without employing a broker. The plaintiffs did not discover this trading by the defendant till after the expiration of the partnership, whereupon they filed a bill to make the defendant account to the partnership for the profits made by him in the other business during the partnership. The court held that the plaintiffs had no right to an account of the profits. The case is distinguished from that of *Somerville v. Mackay*, 16 Vesey 382, and other like cases, where it is held that if any partner has withdrawn or used the partnership funds or credit in his own private trade or private speculation, he will be held accountable, not only for the interest of the funds so withdrawn or credit misapplied, but also for the profits which he has made thereby. See, also, *Sloughton v. Lynch*, 1 Johns. Ch. 467, and 2 id. 210; *Brown v. Litton*, 1 P. Wms. 140; *Crawshaw v. Collins*, 15 Ves. 218.

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APPEALS IN ENGLAND.

Statistics show that there is about the same degree of uncertainty everywhere as to the ultimate fate of cases appealed. A Parliamentary return just issued states that the number of decrees and orders made by the Master of the Rolls, the three Vice-Chancellors, and Mr. Justice Fry, being all the judges of the Chancery Division of the High Court of Justice in England, appealed against since the 1st January, 1877, up to the 11th March, 1878, were 253. Of these, 147 were affirmed, and 106 were reversed or materially varied.

RESPONSIBILITY OF CARRIERS.

The case of *Allan and Woodward*, in the present issue, involved two points of some interest to travellers. The first was as to the effect of a condition, printed on the back of an ordinary passenger ticket for an ocean voyage from Liverpool to Portland, stipulating that the carriers should be free from all responsibility for safe keeping of the passengers' baggage. The condition in the present instance was in these words:—"It is expressly agreed between the passengers within named and the Montreal Ocean Steamship Company, that the latter is not responsible for the safe keeping during the voyage, and delivery at the termination thereof, of the baggage of said passengers." The Company, on being sued by Miss Woodward, a passenger, who, on reaching her home in Sherbrooke, discovered that the greater portion of the contents of her trunk had been abstracted, urged with considerable earnestness that by the conditions of the ticket they were relieved from all responsibility.

The articles of the code regulating the subject are 1672, 1676, 1802 and 1814. Article 1672 says: "Carriers by land and by water are subject, with respect to the safe-keeping of things entrusted to them, to the same obligations and duties as inn-keepers, declared under the title "Of Deposit." Referring to Art. 1814, we find the obligations of inn-keepers thus de-

fined: "Keepers of inns, of boarding houses, and of taverns, are responsible as depositaries for the things brought by travellers who lodge in their houses." And the depositary (by Art. 1802), "is bound to apply in the keeping of the thing deposited, the care of a prudent administrator." Art. 1676 says: "Notice by carriers, of special conditions limiting their liability, is binding only upon persons to whom it is made known; and, notwithstanding such notice and the knowledge thereof, carriers are liable whenever it is proved that the damage is caused by their fault, or the fault of those for whom they are responsible." The Court of Appeal do not appear to have attached any importance to the notice, and it must be presumed they did not think it had been brought to the knowledge of the passenger, within the meaning of Art. 1676. The company did not put the question to Miss Woodward, whether she had read the condition; they contented themselves with proving that she could read, and that the ticket remained in her possession several months. It may be that even if such notice had been proved the result would not have been different, the case falling under the latter head of the article, namely, a loss caused by the fault of persons for whom the Company was responsible. The judgment of the Court below, which was confirmed in appeal, held the loss to have occurred through the want of care of the carriers. That is to say, the notice had no effect one way or the other, and the Company was held liable as not exercising the care of a prudent administrator.

In appeal, two of the judges dissented, on the ground that the loss was not proved to have occurred during the voyage, and this, of course, would take away any right of action against the carriers. This brings us to the second point—the proof of loss. The majority of the Court admitted that the proof made by the plaintiff was somewhat weak, because it was not established very clearly that the trunk remained intact from the moment of its arrival at Portland until it reached the residence of the plaintiff. But the Court attached great importance to the fact that when the trunk was opened on board ship before reaching Portland, it bore traces of having been tampered with, and it was held that a presumption was thereby created that the theft had then been commit-

ted, which presumption it was the duty of the other side to rebut by counter evidence. This is a ruling which would doubtless elicit considerable difference of opinion, especially when it is remembered that the indications of the trunk having been tampered with did not excite the suspicion of the passenger herself sufficiently to cause her to make an examination then and there. The judgment is of a nature to guard the interests of travellers, and to urge carriers to greater vigilance in the protection of the property of which they take charge.

REPORTS AND NOTES OF CASES:

COURT OF QUEEN'S BENCH.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

LARIN (plaintiff in the Court below), appellant; and CHAPMAN (defendant below), respondent.

Sale—Delivery—Mode of Sale of Goods after Tender and Non-acceptance.

The plaintiff, May 7, sold defendant 500 tons of hay, deliverable "at such times and in such quantities" as defendant should order. The defendant having ordered only a portion of the hay, the plaintiff, July 28, notified his readiness to deliver the balance, and then disposed of it by private sale. *Held*, that the terms of the contract bound the purchaser to order the hay within a reasonable time, before the new hay was put on the market, and that the vendor was at liberty to sell at private sale, and hold the purchaser responsible for the loss sustained.

The appellant claimed damages under the following circumstances: He sold respondent, on 7th May, 1874, 500 tons of hay at \$21 per ton, the same to be delivered "at such times and in such quantities" as respondent should order. The respondent ordered a portion of the hay, but the balance not being asked for, the appellant, on the 28th July, notified the respondent that he was ready to deliver the hay according to contract, and would hold him responsible for all loss and damages incurred by reason of his not receiving it. He then stored it in Montreal, and subsequently sold it in small quantities during a period of several months. The action was for the difference of price. The Court of first instance maintained the claim, but in Review this decision was set

aside, the Court holding that even if Larin had a right under the contract to tender the hay at the time he did, he ought to have caused it to be sold at public sale after proper notice.

DORION, C. J. On the 7th May, 1874, the respondent entered into a contract with appellant, by which the latter sold him 500 tons of hay deliverable at the canal, at such times and in such quantities as the purchaser should require it. Larin delivered 147 tons in June, 1874, but the price of hay having then declined, the respondent took advantage of the terms of the contract not to order any more. Larin offered to deliver the balance, and when it was refused he sold it at private sale, and now seeks to recover the difference between the amount realized and the contract price. The Superior Court sustained the action, but when the case was taken to Review, the judgment was reversed and the action dismissed, the reason given being that Larin had no right to dispose of the hay except at public auction or sale at one time. It is evident that this reason is bad, and the judgment is bad, and must be reversed. The contract required Chapman to accept within a reasonable time, and as to the private sale, more was realized in that way than could have been obtained by offering the whole quantity at auction at one time.

Judgment reversed.

Longpre & Dugas for Appellant.

Abbott, Tait, Watherspoon & Abbott for Respondent.

SIR HUGH ALLAN et al. (defendants in the Court below), appellants; and Miss JOSEPHINE WOODWARD (plaintiff in the Court below), respondent.

Carrier—Condition on back of Ticket—Proof of Loss.

A condition, printed on the back of a passenger ticket, exempting the carrier from responsibility for safe-keeping of baggage during the voyage, does not relieve him from liability for loss.

The fact that a trunk, when opened by a passenger towards the close of the voyage, bore traces of the lock having been tampered with, raised a presumption that goods, afterwards discovered to be missing, had then been abstracted, though no examination was made by the passenger at the time.

The action in this case was brought by a passenger on an Allan vessel from Liverpool to Portland, and the claim was for \$272, value of

articles lost or stolen from the plaintiff's trunk during the passage. The claim was resisted on the ground that, even if the loss occurred during the passage, by the condition of the passenger ticket, the appellants (defendants) were relieved from any responsibility for loss or injury to her baggage during the voyage, unless such loss or injury was proved to be the fault of the appellants or their employees in the care and safe keeping of the trunk and effects. The plaintiff had a return ticket, with the following among other conditions printed on the back :— " It is expressly agreed between the passengers within named and the Montreal Ocean Steamship Company, that the latter is not responsible for the safe keeping during the voyage, and delivery at the termination thereof, of the baggage of said passengers." The Court below maintained the plaintiff's action, considering that the articles, the value whereof was sought to be recovered by the action, were lost while in the custody of the defendants, as carriers, through their want of care of the same.

In appeal,

Cross, J., dissenting, held that it was not proved that the loss occurred during the passage to Portland. After the trunk arrived there it was put into a sealed car and brought to Coaticook, and handed over there to the Canadian authorities, and then put into an ordinary baggage car. It was carried in that baggage car until it was landed in the usual way at Sherbrooke. The Court had no distinct proof of the way in which it was dealt with, but there was the evidence of the baggage agent that it was put into a room and kept over night. There was no proof as to how it got to Miss Woodward's residence, the excuse being that the servant man who must have brought it is not forthcoming. Now, the Court had here a contract to carry a passenger's baggage from Liverpool to Portland; it was supposed to end there, but Miss Woodward made a new contract with the Grand Trunk to carry her baggage to Sherbrooke. The question was, where and how did the baggage get astray? While the trunk remained on board the steamer the presumption was against the appellants, but once Miss Woodward had taken the trunk and made a contract for its carriage with the Grand Trunk, the presumption changed, and she was bound to show that the loss occurred on board the

steamer. It was said, by way of showing this, that before leaving the steamer the trunk was opened and the hasp was found to be broken. But this evidence worked both ways, for the respondent did not follow up this discovery by making an examination of the contents. His Honor held that, although the Messrs. Allan were strictly responsible while the trunk was in their custody, they were relieved when it passed from their custody, unless it was shown that the loss of the goods occurred before that time.

MONK, J., remarked that there was no difficulty about the law, but there was a slight difference of opinion with regard to the facts. The contract of the Allans was for safe carriage from Liverpool to Portland. The lady went on to Sherbrooke before the loss was discovered, and there was no evidence where it occurred.

RAMSAY, J., for the majority of the Court, admitted that the case was not without difficulty, but said it was only a question of evidence after all. One question of law had been raised at the argument, that on the back of the contract ticket there was a clause exempting the carriers from liability. That did not apply; carriers could not evade responsibility in the way in which they proposed to do. On the question of evidence, the difficulty in the case unquestionably arose from the particular fact that Miss Woodward had not given the Court a perfectly satisfactory account of this trunk from the moment of its arrival at Portland to its delivery at the house. But there was an important piece of evidence—before the vessel had reached Portland, and while this passenger contract was in full force, one of the officers of the ship, the Doctor, got her trunk out for her, and went with her to open it, and then the lid of the trunk started up, the hasp being broken. Now, here was a fact going strongly to establish that the lock of the trunk had been tampered with on board the steamer. The appellants attempted to get over the difficulty by saying that the place where the baggage was stored was so secured that nobody could enter it; but the evidence was not conclusive or satisfactory. It was as clearly proved as could be that things belonging to passengers were found lying about in the hold of the ship. It might be said the trunk might never have been locked; but the

appellants received it without objection, and they would hardly have taken an open trunk. After that, if there was nothing to show that the loss took place on the ship, the delivery at Portland would have been a good delivery. But the facts above referred to established a presumption that it was tampered with on the ship, and the only way of getting over that presumption would be by showing that it was tampered with elsewhere. The only weak point in the case was in the little transmission from the railway station in the morning to the plaintiff's house. The case was, to a certain extent, weak, but the Court had to give a judgment. The Court below had held the weight of evidence to be in favor of Miss Woodward, and the majority of the Court here could not say that that was a bad judgment; therefore, it was their duty to confirm it.

Judgment confirmed.

Abbott, Tail, Wotherspoon & Abbott for Appellants.

Davidson & Cushing for Respondent.

SUPERIOR COURT.

Montreal, Sept. 17, 1878.

JOHNSON, J.

MACDONALD V. JOLY et al.

Injunction—Mandamus—New Conclusions.

An injunction issued against parties about to take possession of a railway. The injunction was disregarded, and forcible possession taken of the railway. *Held*, that the petitioner, at whose instance the injunction was ordered to issue, might be allowed to add to his conclusions a prayer that he be re-instated in possession.

JOHNSON, J. The point now is one of procedure. The petitioner wants to add to his conclusions, and to be allowed to ask that he may be re-instated in his possession, on the ground that since the injunction issued, the defendants have in violation of its provisional order, taken forcible possession. The only objection urged was that this would be an attempt to get a mandamus as well as an injunction. That can hardly, perhaps, be called an objection; it is an observation, however, of a highly technical character; but if it should turn out that substantially the right demanded ought to be granted, we must not be deterred by mere names from doing what is just and legal in itself.

There are principles as well as names, in procedure, and the Court must be guided by principles, and not frightened by bugbears. This man asked for, and got an injunction. He now says:—"I have submitted myself to the law; but Her Majesty's writ was disregarded, and I want to be allowed to allege this, so that if I can prove it, I can get possession again of what has been taken from me by force." The question now is, not as to the nature and extent of his possession; that will arise hereafter. The only thing now is as to his right to allege this, and to ask—not to get—restitution. It is quite evident that if men cannot be allowed to complain to the Court of their alleged wrongs, the consequence to society would be most disastrous. Take, for instance, the case that this very man puts forward—(whether true or false is not now the question). He says:—"I tried the authority of the law; but it was ineffectual, and was overpowered by force. I must either have the right to repel force by force, or to tell my wrong to the court of justice." Can there be a doubt that law and order ought to prevail, and that this man ought not to be told that he has no right to come here and state his case; but that he is to be left to the savage remedy of force?—for the law can only abridge the natural rights of men by substituting its own power.

It has often been said that the only difference between a mandamus and an injunction is that the one is an order to do a thing, and the other an order not to do it, and it is said that in England the party would probably be told:—"You may take your mandamus if you like, or your injunction, according to the facts you present; but you can't take them both in one and the same case." But we have our own law, and very ancient and well settled law, that has not been abrogated by the Code, or the statutes that gave us summary *requêtes* where the remedy would in England have been by mandamus or by injunction. We have our own *procédure civile*, and by recurring to the highest authority of old Pigeau we may set right several notions that have perhaps gone a little wrong in the present case. Of course, I am not now considering whether what the plaintiff says is true or not, much less whether it can be successfully opposed by the other party. I am only looking at what it is that he says and asks, and he says

he has been dispossessed by force of arms, and without any authority or process of law, and he asks that he may be allowed to put all this before the Court. I decline to believe or to listen to all that was said as to the kind of force used. It is not necessary that I should do so at present. His possession may turn out to be worthless in the end; but that is no reason why he should not allege and prevent if he can, if he has a legal right to do so. It is mere delusion of the weakest and wildest sort to rush at once to the merits of this case, and to try and see, or, rather, fancy (for the thing itself has no existence in the allegations of the parties) any possible resemblance between the situation of the parties here and the relative situations of a proprietor and a builder of a house. Neither Macdonald nor the other party puts the case on any such ground. They both of them repudiate that ground. They both say expressly that the claim of the defendants to supersede the ordinary methods of civilization for enforcing individual rights, rests (whether truly or not, I am not now examining) on a statute giving them the power in question, and is not a claim they make by virtue of the right of property being in them, or their having a contract for the resumption of it; and Macdonald sets up expressly that no such power exists at all—that it required federal authority, which has not been obtained, to extend the operation of the Provincial statute to a federal railway. Therefore it is childish to talk of there being any analogy between the two cases. In the one the party says:—"We have a contract, and by it you consented I should retake possession." In the other, he asserts there is a statute enabling him to take possession whenever he likes; and the other side answers, not only is there no such law applying to this case, but even if there was, it must be executed by due process, and not by bayonets and bludgeons. Now, which of the two may be right, I will not stop now to discuss; but in dealing with the present motion it will suffice to say that if what Macdonald says is true, there is abundant authority for granting it. I must say that it is to me inconceivable why, if the Government had the right they claim, they did not proceed at once by action against Macdonald. I say inconceivable on legal grounds, for I can readily understand the law's delays are distasteful to those who think they have a

clear right. The same thing may be said, however, as to the recovery of a debt; but the creditor nevertheless could hardly pay himself in his own way by garotting his debtor, or picking his pockets. Therefore, I look at the case by principle and authority. First, let us see what Pigeau says: Vol. II, page 8. No one will doubt that this proceeding is essentially and on principle a veritable *complainte*. Here is what Pigeau says on this subject. [His Honor read from the book cited.] It results from this authority that Macdonald has the right to make his *complainte* now; and it would be strange indeed if he had possession (as he says he had, whether truly or falsely makes no difference now, since it is only the admissibility of his demand, not the final granting of it that is in question), that the other party, by an illegal proceeding, should prevent him from asking it. I say illegal proceeding, speaking of it only as illegal of course, without prejudging the fact. The clearest principles would receive violence if this application were refused. There is a maxim dominating this subject, and pervading all the authorities. It is:—"Que les parties doivent rester avec les mêmes avantages jusqu'à ce que justice en ait autrement ordonné." It is derived, says Pigeau, vol. I, page 116, from two others equally certain, "that possession vaut titre jusqu'à la preuve du contraire, et qu'il n'est pas permis de se faire justice à soi-même." Another principle, or another enunciation of it is the well-known one, "*Spoliatus ante omnia restituendus*." Commenting on the maxim, qu'il n'est pas permis de se faire justice à soi-même, Pigeau has some observations very applicable to the present case. See vol. I, p. 114. In conclusion I will only say that according to Pigeau, and according to all principles upon which law and order depend, this application if made in an ordinary case would certainly be granted; and whether the first process be summons or injunction can make no difference.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONE, RAMSAY, TESSIER, and CROSS, JJ.

MACDONALD v. The Hon. J. G. JOLY et al.

Injunction—Contempt—Appeal.

M., contractor with the Quebec Government for building a railway, learning that the Government, under Public Works Act, 32 Vict., cap. 15, ss. 179, 180 (1869), was about to take possession of the road, which

was not completed, obtained a writ of injunction to restrain the Government from interfering. The Government proceeded to take possession, and a motion to dissolve the injunction being rejected, obtained leave to appeal to the Court of Queen's Bench.

Held, that, under these circumstances, an order to suspend the injunction until the appeal could be heard, should be granted, notwithstanding the fact that the injunction had been disregarded.

The defendants moved for an order to suspend the injunction (*ante* p. 446.)

RAMSAY, J., dissenting: This is an application under the statute of Quebec of last session for an order to suspend an injunction from the Superior Court, now pending before this Court on the merits of an interlocutory order rejecting a motion of appellants to dissolve the injunction. A preliminary difficulty was suggested that the writ of appeal was not returned, and that, therefore, no order could be made by this Court. With some hesitation I concurred in the judgment overruling this objection, and the parties were heard. Respondent then filed an affidavit setting forth in effect that the injunction had not been obeyed, and that the appellant, with armed force, resisted the execution of the writ of injunction. Under these circumstances, I must persist in the view I expressed on a previous occasion, and say that the appellant, while thus a wrong-doer, cannot be allowed to answer the injunction at all. His first duty is to obey. It must be manifest that if he is above the law he need not come to us. If he defies by an armed force the process of the Superior Court—the great Court of original jurisdiction in the Province—he will not likely pay much respect to our decrees, and his appeal to us is an idle ceremony. To me it appears so clear that this must be the law of every community governed by law that I should hardly expect to be called on to cite any authority to justify it; but the ground I take is sanctioned by a very respectable authority which I quoted on a previous occasion, and which I shall repeat once more at length. "And if after service it shall be disobeyed, process for contempt issues till the offender be taken and committed upon an affidavit of his disobedience. And when he is taken he shall be committed till he obey or give security for his obedience, and shall not be heard in the principal case till he obey."

Comyns Dig. V. Chancery (D. 8) Injunction, Vol. 2, p. 231. Supported by this authority I might in turn ask for some *dictum* of text writer or judge, either under the French or English system, but none has been produced, and I think that I may almost predict that none will be produced. We may be told that the proceedings are summary, and all sorts of cases, some of them apparently of great hardship, may be cited, but not one that says relief was given on an injunction the execution of which was defied. Of course, no authority short of this has any bearing on the case before us. It was said yesterday that the power to suspend the injunction necessarily implies the suspension before its execution. To me it appears to imply precisely the reverse. It was also said that the *dictum* in Comyns was good so far as it goes, but that it does not apply to appeal. This commentary seems to me to admit too much, or not go far enough itself. If it is good law in the Court below, one may fairly ask why it should not be applicable here? I think we should be as jealous of disregard of the authority of the Superior Court as we should be of a contempt of our own, and until we are I fear we have much to learn. Again, if it be contended that there were two motions, although but one judgment, and that the appeal is only as to that part of the judgment rejecting appellant's motion, and that the judge in the court below heard this motion and thereby overlooked the contempt, I must say that I consider the argument as evasive. Two motions were made in the court below—one to dissolve the injunction and the other on the rule for contempt. They were heard together and decided together, and while rejecting the motion of appellant and Peterson, the latter was adjudged to be in contempt. The whole matter, therefore, was before the Court, and it was all adjudicated upon. Are we, therefore, to suppose that the Judge overlooked or absolved the contempt? He condemned it then—it exists now, and we may say what we will, the effect of our judgment is to render nugatory the order of the Court on the contempt, if still existing. The bureaucratic argument has also been pressed on our attention. We have been told that the injunction was a nullity, and that with the warrant of the Lieutenant-Governor one can disregard all process. Such doctrine

may be accepted at Berlin or Paris, but it will be repudiated by those whose ideas of administrative authority have been acquired where rational liberty within the law is a reality, and not a novel abstraction. Besides, it is obvious that if the local executive is beyond the jurisdiction of the Superior Court, it cannot be helped by us. We have also heard that it was inconvenient for Mr. Joly to obey the writ because he might be dismissed by the Lieutenant-Governor for so doing. It is impossible to say how far that functionary may abuse his power, but awful as his wrath may be, it seems to me less terrible than the sewage of Banbury, and its neighborhood; yet the Local Board of Health was told that Cherwell should not be polluted so as to injure Mr. Spokes. (*Spokes v. Board of Health of Banbury*, L. R. 1 Ex., p. 42). I therefore dissent from the judgment about to be rendered, without expressing any opinion on the merits.

MONK, J., also dissenting. I also have to express my regret that I cannot concur in the judgment about to be rendered by the Court. With much, if not all, that has fallen from my learned colleague, Justice Ramsay, I agree, but I do not think it necessary that I should rest my opinion on quite so broad a basis. No doubt that the fact of the appellants having disregarded, even resisted, the writ of injunction issued by the Court, is a very grave objection to the granting of this application. It is an extremely novel proceeding for a party in flagrant disobedience and contempt of the order of the Court below to apply to this Court to suspend the order or writ thus set at defiance. A great deal might be said on this part of the case—but this is an application to the discretionary power of this Court to suspend, during a period to be fixed by the Court, the writ of injunction, and the motion rests upon an alleged urgent necessity, set forth in the motion and supported by affidavit. It is said that the road requires ballasting, and many other measures must be taken to render it safe for traffic; for that purpose it is necessary that the writ should be suspended and the appellants be put in possession of the road. Now, as a matter of fact, in appears from the evidence that not only have the appellants disregarded the writ of injunction, but in doing so they have taken possession of the road, and that it is now held by

them, and is under their entire and exclusive control. The ballasting may be carried on without any intervention on our part. The granting of the motion would be more or less to sanction or to countenance this defiance of the writ of injunction. This cannot be done. Such a proceeding on the part of this Court would be very much to be regretted. I do not in any way express an opinion on the merits of this writ of injunction—whether founded or not, it is not our business to determine. We are asked to suspend the writ, and I confess I cannot see how the Court should interpose its authority where there is no urgency—no necessity for such an exercise of the discretionary power of this Court. The appellants are in possession by proceedings which I am not called upon to characterize on the present occasion. They will no doubt remain in possession without any assistance from this Court. In the present state of affairs I do not think that this Court should interfere.

DORRIS, C. J., for the majority of the Court, said the main ground of difference of opinion in the case was that the parties asking for the suspension were in violation of an order of the Court below, and it was contended that this Court could not entertain any application from them until they had submitted. If that were so, this Court was wrong in granting an appeal, because the judgment showed the contempt, and the party should not have been heard. The rule referred to was from *Comyns' Digest*, and was founded on a rule of practice in the English Court of Chancery—not of the Courts which now had power to issue injunctions. His Honor did not find such rule in the new books. None was cited at the bar, and he had looked in vain in *Archbold's Practice*, *Lush's Practice* and *Fisher's Digest*. He found no trace whatever of such a rule, and he came to the conclusion that this, like other old rules which had existed in England with respect to *capias*, &c., had been swept away by the new legislation. It was formerly held that the order of injunction could not be touched, but the Imperial Act of 1817 says the rule may be varied and altered. Even if this old rule had not been swept away by Imperial legislation, he considered that it was abrogated by our own Provincial Act. His Honor read sections 8 and 9 of the Prov. Statute, 41 Vic. It was evident that

the Legislature wished to guard against surprise, and to give the Court in these cases the right to go back upon its own order. Suppose a writ was issued against A for refusing to give up a house, and it was served by mistake on B, the latter, according to the contention of the opposite party, would have to give up his house before he could be heard, though it would be easy for him to show the mistake. This was one of the absurd consequences to which such a cast-iron rule would bring us. His Honor referred to the case of the injunction issued against the Montreal Telegraph Company, where the injunction was set aside subsequently. The Court, then, having the right to suspend the execution of the injunction, was the present case one in which such discretion should be exercised? The law provided that the Lieutenant-Governor might notify the party holding the work, and give an order to the Sheriff to take possession of the property. An attempt had been made to show that this did not apply because the railway was under the control of the Dominion authority; but between the Government and Macdonald he was bound by his own contract; he had taken the contract from the Local Government; he had recognized their authority, and had agreed that the Lieutenant-Governor might take possession of the road, not at the completion of the work, but whenever he chose to do so. The Lieutenant-Governor was the sole judge; the Court had no right to revise the Order in Council. Here, too, it was admitted that the time for completing the work was over on the 1st October last; at that date the work was to be delivered over. It was no doubt an extraordinary power, but it was stated in Mr. Joly's affidavit that it was necessary to ballast this road to make it fit for travel, and the work must be done before winter. It was an arbitrary power, but there were arbitrary powers which were necessary to be exercised in many cases. Here, not only in virtue of the law of the land, but in virtue of the condition in the contract, the Government took possession of the road. The writ ordered the officer not to do so, and he found himself between two orders. The majority of this Court thought there had been a surprise on the Judge below, and that he was not aware of the existence of the law. However this might be, the injunction had issued

for a breach of contract between the Government and Macdonald; but the injunction was not issued as against the breach of contract alleged. The breach alleged was that the Government had not paid Macdonald a million dollars that they owed him. The order issued improvidently, and this Court was bound to suspend it. If the Government had brought an action claiming the road, the contractor would not have had the right to keep it until he was paid. A strong *prima facie* case had been made out; the road was in want of repairs, and the repairs had to be made immediately. The time for completing the works had expired long ago. The contractor could not suffer by taking possession. He could petition the legislature on the subject of his claims. The order of the Court would go that the injunction be suspended till the 14th December next. This would give the appellants four days after the opening of the December term to ask for a renewal of the suspension.

TESSIER, J., concurred entirely with the reasons given by the Chief Justice.

CROSS, J., also concurred. The Court suspended the injunction, with a strong suspicion that a mistake had been made, but that would come up on the merits. Macdonald could not suffer, as he had a solvent debtor to deal with.

Injunction suspended till December 14.

E. Carter, Q.C., for Appellants.

Doutré & Co., for Respondent Macdonald.

CONTRIBUTORY NEGLIGENCE.

[Concluded from p. 455.]

Todd v. City of Troy, 61 N. Y. 506.—An action for injuries received by falling on an icy sidewalk. The ice was covered with a thin coating of snow; the plaintiff had on no "rubbers;" and she was walking fast, but at her usual gait. Held, a proper case for the jury. The court observes: "I know of no rule of prudence that requires every person who goes into the street in the winter to wear rubbers."

Sheehy v. Burger, 62 N. Y. 558.—Plaintiff stepped off a sidewalk to cross a street, when the end of a long plank on a truck swept around as the truck turned, and hit her. It was held that the failure to observe this unusual appendage dragging behind the truck,

and to calculate its dangerous sweep, was not *per se* negligent; and a non-suit was set aside.

Burrows v. Erie Railway Co., 63 N. Y. 556.—Defendants' train stopped at a station, and the plaintiff endeavored to get off, but before she could alight the train started. She requested a gentleman to assist her, and he endeavored to do so, when both fell, and she was injured. Held that her acts were negligent *per se*, and she should have been nonsuited.

Messoth v. Delaware, etc., Co., 64 N. Y. 524.—This was an action for injury at a railway crossing. The employer of the deceased, who was with him at the time, and driving, testified that he looked both ways, and saw no train. Held, a proper case for the jury.

The court said: "It does not necessarily follow from the fact that a skilled engineer can demonstrate that from a given point in a high-way the track of a railroad is visible for any distance, that a person in charge of a team approaching the track is negligent because from the point specified he does not see a train, approaching at great speed, in time to avoid a collision."

Haycraft v. Lake Shore, etc., Co., 64 N. Y. 636.—Plaintiff had crossed two railway tracks in the city of Buffalo, and then looked both ways, saw a train coming from the east on the fifth track. She waited for it to pass, standing between the second and third tracks, within about a foot of the third. As the train she was watching passed, she was struck by the tender of a locomotive backing up on the third track from the west, without giving any warning of its approach. Held, that the question of her negligence was for the jury.

Mitchell v. N. Y. Cent., etc., Co., 64 N. Y. 645.—The deceased was killed at a railroad crossing in Greenbush. Before she came to the track in question she had crossed two tracks, and on the third track a running switch was being made. The view was, however, unobstructed, and it was the engine that struck her as she stepped on the third track. Held, that a nonsuit was properly granted, for it was clear that if she had used her senses she must have seen the engine in time to avoid it.

Gray v. Second Ave. Railroad Co., 65 N. Y. 551.—Plaintiff's carriage and horses were standing at a hack stand. A passing snow

plough on defendants' track threw mud and snow into the carriage, frightened the horses, and they ran away, sustaining injury. The plaintiff's driver did not have hold of the reins, but stood by the carriage door reading a newspaper. A nonsuit was refused, and the jury found a verdict for six cents. The plaintiff appealed, but the court refused to set it aside, holding that the error, if any, was in not granting the nonsuit.

Maber v. Central Park, etc., Railroad Co., 67 N. Y. 52.—The plaintiff, a boy ten years old, hailed a street car; the driver stopped, and the plaintiff was going to the rear platform, when the driver told him to get on in front; he did so, and was on the first step, when the car started, throwing him off, and the car wheel ran over his legs. Held, that his getting on in front did not, under the circumstances, constitute negligence as matter of law, but it was a question for the jury.

Ginna v. Second Ave. Railroad Co., 67 N. Y. 596.—The deceased got upon a crowded street car and stood upon the platform. The conductor took his fare. A jolt of the car, produced by the defendants' neglect, threw him off and killed him. A recovery was affirmed.

In this case two cases were cited as authority which we have remarked upon. One was *Willis v. L. I. Railroad Co.*, 34 N. Y. 670. There it was held that passengers are not to be deemed guilty of negligence for standing on the platform of a car in motion, when there are no vacant seats inside, nor is it their duty to pass from one car to another in search of seats when the cars are in rapid motion. The other was *Edgerton v. N. Y. & Harlem Railroad Co.*, 39 N. Y. 227, in which it was held that it was not negligent for a passenger to enter a caboose car attached to a freight train; although it was not a passenger car, yet passengers were carried in it and the defendant received fare from them, and so incurred the ordinary liability.

Cleveland v. N. J. Steamboat Co., 68 N. Y. 306.—The plaintiff, a passenger on defendants' steamboat, was standing, before the boat had started, on the gangway, in front of the opening, across which was a gate. Another person endeavoring to jump ashore, just as the boat moved away, fell into the water. This caused a rush of passengers, who pushed plaintiff

against the gate, which gave way, and he fell overboard and was injured. Held, that his position was not negligent *per se*.

Hoffman v. Union Ferry Co., 68 N. Y. 385.—In an action for a collision between vessels, the omission of the injured vessel to comply with statutory regulations, or with the usages and customary laws of the sea, is not *per se* a bar to a recovery. It is a circumstance to be considered in ascertaining the proximate cause of the injury.

Eppendorff v. Brooklyn, etc., Co., 15 A. L. J. 431.—Plaintiff signaled a street car; the driver blowed up; the plaintiff put one foot on the side rail, and grasped the end of a seat, but before he could put up the other foot the driver, while looking at him, and without any signal or notice from him, let go the brake, the car received a jerk in consequence, and the plaintiff was thrown under the car and injured. A nonsuit was held to have been properly denied. It is not always negligent for a person to get on a street car in motion.

Lambert v. Staten Island R. Co., 4 N. Y. W. Dig. 574.—Anchoring a sail-boat at night, with a light set, in a channel which is the customary path of a ferry boat, is not *per se* negligent.

Coulter v. American, etc., Co., 56 N. Y. 585.—Plaintiff was walking on a sidewalk in Syracuse when defendants' express wagon, driven rapidly, came up behind her. Without looking around, she sprang sideways to avoid the danger, and struck her head against a wall and was injured. Held, that it was a case for the jury.

The court say: "An instinctive effort to escape a sudden impending danger resulting from the negligence of another does not relieve the latter from liability. The law does not require a delay in the efforts to escape until the exact nature and measure of the danger is ascertained."

Lanigan v. N. Y. Gas-light Co., 5 N. Y. Week. Dig. 281.—The service pipe in plaintiff's house leaked, to plaintiff's knowledge. His servant went into the cellar where the leak was, with a light, and the gas exploded, injuring the house. Held, that the plaintiff must be supposed to have known the danger of bringing a lighted lamp in contact with escaping gas, and to be responsible for a disregard of the peril. That it was a voluntary and negligent exposure of

his property to danger, not to see that the escape of gas was properly prevented.

Gillespie v. City of Newburgh, 54 N. Y. 468.—Plaintiff was driving in a top buggy wagon along an embankment on a public street, and approaching a railroad crossing. The edge of the embankment had been guarded by a railing, but for a space of about eleven feet the railing was gone. Seeing a train approaching, and the railing at his right, he backed his wagon to the right in order to turn his horse away from the train. The wagon fell down the embankment through the open space, and he was injured. The top of the wagon was up and prevented his seeing the defect, but he might have discovered it by turning his head and looking out of the back, or putting his head out of the side of the wagon. This was held a proper case for the jury.

McGovern v. N. Y. Cent., etc., Railroad Co., 67 N. Y. 417.—The deceased, eight years old, was killed at a crossing while on his way to school with several other children. It was claimed that the deceased was guilty of contributory negligence because he did not look to the west before stepping on the track. But held, that the rule which requires persons before crossing a railroad, to look out for approaching trains, is not applied inflexibly, without regard to age or circumstances; the same maturity of judgment or degree of care and circumspection is not required or expected in a child of tender years as in an adult.

Evans v. City of Utica, 15 A. L. J. 353.—Plaintiff was injured by falling on an icy sidewalk. When asked if he paid attention when he passed upon it, he answered that he stepped on the ice right along. Held, that the law does not demand of one passing along a street in a city extraordinary vigilance when there are no manifestations of difficulty or apparent danger. The mere fact that there is ice on a sidewalk does not necessarily establish that it is negligent or dangerous to pass over it.

McGarry v. Loomis, 63 N. Y. 104.—Plaintiff, four years old, went out from his parents' house, near the defendants' steam planing mill, and fell into a hole in the sidewalk, through which the defendant conducted waste hot water and steam, and was scalded. It was held that the circumstance did not show contributory negligence on the part of the child, and that negli-

gence on the part of the parents was therefore not a question.

On the question of imputable negligence we will refer to *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, and *Prendergast v. N. Y. Cent. R. R. Co.*, 58 id. 652; both cases of persons *non sui juris*.

We think the foregoing review comprises all the important cases on this subject in our Court of Appeals. It will be noticed, however, that we have not embraced those growing out of the relation of master and servant. Those we have reserved for separate review at some future day.

From the foregoing cases we think the following conclusions may fairly be derived:

1. One cannot recover damages from another for an injury alleged to have been occasioned by the negligence of that other, if his own negligence in any degree contributed to the injury.

2. In order to recover in such an action, although the burden is on the plaintiff to show that he himself was not guilty of such contributory negligence, yet he need not produce evidence in the first instance to show it; it is sufficient if it appears from the whole evidence.

3. Although due care on the part of a person injured is not presumed without proof, yet direct evidence is not always demanded. Where, from the nature of the case, it is manifestly impossible to give such proof, the locality and circumstances may be of such a kind, and the act producing the injury of so dangerous and reckless a nature, and the person injured of such experience, intelligence, and circumspection, that the jury may infer due care on his part from the ordinary instinct of self-preservation.

4. What is contributory negligence is a question of fact for a jury, unless the evidence adduced to prove it is uncontroverted, or is of such a character that honest and intelligent men cannot possibly differ as to its effect.

5. The test as to whether the complainant has been guilty of contributory negligence is, whether he acted as ordinarily prudent persons, of the same age and capacity, would have acted under similar circumstances.

6. In consciously approaching a place of known danger, one cannot assume that another will perform his legal duty toward him, and so

neglect to avail himself of the vigilant exercise of his own senses for protection; and if he fails to exercise such caution he is not excused by the other's neglect to perform such duty. On the other hand, in a place where no danger can ordinarily or reasonably be apprehended, no such high degree of caution is exacted, but ordinary prudence will suffice.

7. Although contributory negligence on the part of the plaintiff will permit a recovery in such cases, yet if in spite of it the defendant could by the exercise of ordinary care have prevented or avoided the injury, he is liable therefor.—*Albany Law Journal*.

NEW PUBLICATIONS.

THE CANADIAN LEGAL DIRECTORY.—A Guide to the Bench and Bar of the Dominion of Canada. Edited by Henry J. Morgan, Esq., Barrister-at-law. Toronto: B. Carswell, publisher, 1878.

Mr. Morgan describes this work "as the first attempt at bringing the Bench and Bar of the Dominion and of the several Provinces thereof under one cover;" and having some conception of the formidable obstacles which must impede the execution of such an undertaking, we confess we are surprised at the completeness of the information which has been obtained. Probably no one who had not the experience which the author has acquired in this department of literature would have persevered in the task or have succeeded half so well. The volume comprises 279 pages, and almost every page is the result of special effort in seeking the information contained in it. The Judges and officers of the Courts throughout the Dominion, with their salaries, duties, &c., are fully set out. The Bar receives equal attention. Lists of coroners, official assignees, registrars, notaries public, &c., are to be found in their proper places.

Part II. comprises 81 pages of "biographical data" respecting the Judges of all the Courts in the Dominion. This information is of an interesting character, and can be found nowhere else, the greater part having evidently been communicated by the gentlemen themselves. The Canadian Legal Directory fills a want long felt, and the editor has earned the best thanks of the profession by the painstaking manner in which he has executed the undertaking.

CURRENT EVENTS.

ENGLAND.

LAW REFORM IN ENGLAND.—The *London Law Journal* reviews the Session of 1878, and finds it barren in regard to law reform, but takes comfort in the promise of the criminal code bill. It says:—'The session of 1878 has done nothing whatever in the way of law amendment; but by this time law reformers ought not to be surprised or discouraged by a blank year. There are several reasons for the slow progress of law reform. Though the public grumble about the law and laugh at the comic abuse of lawyers, yet they hold the law to be, on the whole, excellent, and have full faith in our profession. The instincts of the nation—we do not, of course, now speak in a political sense—are fundamentally conservative, and there is a very natural disinclination to change the laws. The laws are not so faulty as to be oppressive, and the English people do not get enthusiastic about a grievance that does not pinch them. Parliament, reflecting the views and disposition of the nation, always closely examines any law bill; and the House of Commons conscientiously and firmly refuses to delegate its authority, in respect to law bills, to the experts—that is, the lawyers—in the House. Then the judicature acts were a large dose of law reform; and, for a time, it has appeared to exhaust the law-amending energy of Parliament. We are not discomfited by a session that is barren of law reform, for we know that if reform were urgent, it would not be delayed. Let it not be supposed that we have adopted the doctrine of finality, which is not, never has been, and never can be, applicable to the law. Society is not made for the law, but the law for society; and, since society is constantly changing, the law requires to be changed. The law reformer will never have to complain that his occupation has gone. But at present there is no such discrepancy between the provisions of the law and the requirements of society as to make law reform a burning question. The Criminal Code Bill, which we are very fully reviewing in our columns, is in every respect a truly grand measure. It has been referred to a Royal commission, and Parliament will not delegate its authority or compromise its dignity by accepting, so far as codification of the exist-

ing law is concerned, the decisions of the eminent jurists who constitute the commission. If so, we may hope that the session of 1879 will be distinguished as the Criminal Code Session. On the whole, there is not much reason for law reformers lamenting the barrenness of the past session, whilst they have reason to hope that the next session will be fruitful.'

UNITED STATES.

LIABILITY OF CITY.—In *City of Joliet v. Harwood*, 86 Ill. 110, it is held that if a city employs a person to do work which is intrinsically dangerous, such as the blasting of a rock in a street for a sewer, and the contractor uses all due care, and inquiry results to a person from a stone thrown by the blasting, the city will be liable to respond in damages for the injury. The general rule is that where a person lets work, to be done by another by contract, which is innocent and lawful in itself, but which may, if carelessly or negligently done, result in injury to another, he is not charged with liability if such work is in fact carelessly and negligently performed; but he is liable, when the work to be done necessarily creates a nuisance. The blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling-house, or in the vicinity of a highway, is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Reg. v. Mutter Leigh's Cases*, 491. But see *McCafferty v. Spuyten Duyvil, etc., R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267. In that case, a railroad company let by contract the entire work of constructing its road. The contractor sublet a portion of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiffs' adjoining property, injuring it, and it was held that the railroad company was not responsible. The court says that this is not a case where the defendant contracted for work to be done which would necessarily produce the injuries complained of, but such injuries were caused by the negligent and unskillful manner of doing it. The cases of *Pack v. Mayor of New York*, 8 N. Y. 222; *Kelly v. Mayor of New York*, 11 id. 432, and *Storrs v. City of Utica*, 17 id. 103, are cited as authority; and it is said that *Hay v. Cohoes Co.*, *supra*, is not an authority upon the questions involved in *McCafferty v. Spuyten D. R. R. Co.* See, also, *Butler v. Hunter*, 7 H. & N. 826; *Reedie v. London, etc., Ry. Co.*, L. R., 4 Exch. 244.

The Legal News.

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THE JUDICIARY OF CANADA.

It is but a few weeks since we remarked upon the inadequacy of the salaries paid to our judges, and the unreasonableness of expecting first-class work from men who are accorded only the remuneration paid elsewhere for mere clerical labor. We are glad to find Lord Dufferin, our eloquent Governor-General, in the magnificent address which he delivered on the 24th ultimo, at the opening of the Toronto Exhibition, lending the influence of his great name, ripe statesmanship and sound judgment in the same direction. This is the wise advice which His Excellency, in what he solemnly terms his "parting counsels", tenders to the people of the Dominion:

"With regard to the independence of the judges I will say nothing; notwithstanding what has been done elsewhere, I do not think that the Canadian people will ever be tempted to allow the judges of the land to be constituted by popular election. Still, on this continent there will always be present in the air, as it were, a certain tendency in that direction, and it is against this I would warn you. And now that I am on this topic, there is one further observation I am tempted to make in regard to the position of the judges. I should hope that as time goes on, as the importance and extent of their work increases, and as the wealth of the country expands, it may be found expedient to attach somewhat higher salaries to those who administer the laws. Pure and righteous justice is the very foundation of human happiness, but remember it is as true of justice as of anything else—YOU CANNOT HAVE A FIRST-RATE ARTICLE WITHOUT PAYING FOR IT. In order to secure an able bar, you must provide adequate prizes for those who are called to it. If this is done, the intellectual energy of the country will be attracted to the legal profession, and you will have what is the greatest ornament any country can possess—an efficient and learned judiciary."

Canada is under a great debt to her departing Governor, and we feel sure that no acknowledg-

ment will be more acceptable to him than a timely attention to his farewell words.

THE RAILWAY INJUNCTION CASE.

The report of proceedings in our last issue in the *cause célèbre* of *Macdonald v. Joly et al.*, read almost like a page from the notorious Erie Railway battle of a dozen years ago. Happily this strife is likely to end soon, if, indeed, the end has not already been reached. A compromise, it is stated, has been assented to, and the war of injunctions will cease.* It seems a proper time, therefore, without expressing any opinion on questions which may still come before the Courts, to review briefly the proceedings which have taken place.

Mr. Macdonald, the party applying for the injunction, had entered into a contract with the Quebec Government for building the M. O. & O. Railway. The time fixed for the completion of the road was the 1st October, 1877. The line was not completed at this date, and Mr. Macdonald continued to hold possession, and for several months back has been running trains from Montreal to Hull, and carrying passengers and baggage over the road. He also claimed that a large sum was due to him under the contract.

Under these circumstances, the Government of Quebec determined to take possession of the railway. The authority under which they acted is the Public Works Act of 1869, 32 Vict., cap. 15. Sections 179, 180 and 181 of this Act are as follows:—

"179. The Lieutenant-Governor may at any time order the Commissioner to re-enter into possession of any public work or building, in consequence of the termination of any lease, charter or agreement whatever, of the taking effect of a resolutive condition, as well as for non-fulfilment of any contract or for any other cause of rescission, or for public purposes.

"180. Such Order in Council must be served on the holder of such public work or building, or on his representatives on the spot, and immediately after such service the Commissioner, or any person authorized by him for such purpose, may, without any other formality, take possession of the public work or building specified in the Order in Council; without prejudice to any recourse for indemnity by the party dispossessed if he deems himself aggrieved thereby.

"181. Should the holder or his representatives refuse or neglect to deliver up such public work or building to the Commissioner of Public Works, or to

*Since the above was in type, the reported compromise has been contradicted.

any person deputed by him, the sheriff of the district in which such public work or building is situated, shall, immediately after the service of the Order in Council aforementioned, under a warrant signed by the Lieutenant-Governor, be bound to seize such public work or building and to maintain the Commissioner or any person deputed by him in the possession thereof."

It was contended on the part of Mr. Macdonald that the Government could not avail themselves of this Statute, as the railway was a federal work, and the authority of the Federal Legislature would be necessary to permit the Government to take possession.

The warrant having issued, Mr. Macdonald, by his counsel, applied in Chambers to Mr. Justice Rainville, of the Superior Court, for an injunction to stop the proposed seizure of the road. The Judge ordered the injunction to issue. It is said, but we do not know on what authority, that His Honor's attention had not at this time been called to the clauses of the Statute cited. The injunction was disregarded by the Government, and Mr. Macdonald was dispossessed by force. It was at this stage that an application was made by Mr. Macdonald to have the Government Engineer and the Sheriff, the officers executing the orders of the Provincial Government, committed for contempt. Mr. Justice Johnson granted the application as far as Mr. Peterson was concerned, but relieved the Sheriff (*ante*, p. 446). At the same time His Honor rejected an application from the other party to revise the order for the injunction, the ground being that while the party was in contempt he could not be heard on the principal case. From this decision the Government obtained leave to appeal to the Court of Queen's Bench (*ante* p. 448). This did not of itself suspend the proceedings in the Court below (see Injunction Act of last session); but the Court of Appeal, on a proper application being made, exercised the discretion accorded to it by the Act of last session, and suspended all proceedings until December 14, (*ante* p. 461).

This outline of the proceedings, imperfect perhaps in some respects, will serve to make the judgments which we have published clearer to the general reader. The story breaks off here, and, happily, there is no "to be continued" at the end of the chapter. It must be an immense satisfaction to us, amid the noise

of strife of this nature, to know that we have a Bench that may be depended on. If ever we are able to appreciate an untrammelled, incorruptible, and thoroughly independent judiciary, it is when large interests are at war, and the extreme remedies of the law are brought into play on one side or the other. It is a time when unshaken adherence to principle shows in bright contrast with judicial action influenced by personal or partizan feeling, such as might perhaps be looked for in an elective judiciary, but of which, under the superior institutions which we enjoy, not a trace exists—at least, let us think so.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 9, 1878.

RAINVILLE, J.

KNOX v. LAFLEUR.

Procedure—Faits et Articles—Commission Rogatoire—Art. 221 C. P.

Held, 1. A party has not the right to examine his adversary *sur faits et articles* before trial.

2. Where the plaintiff has inscribed the case for proof and final hearing, a notice served by defendant upon the attorney of his absent adversary two days before the date fixed for trial, for *faits et articles* on the day of trial, is in time; and if there is no apparent attempt to retard the trial, the court will grant such application, notwithstanding the words in Art. 221 C. P.,—"Without retarding either trial or judgment."

3. When the attorney of an absent party, upon whom an order for *faits et articles* has been served, indicates the residence of his client (Art. 223) and his option to have him examined by commission at such place, the commission will be at the diligence and expense of the party requiring the interrogatories.

R. A. Ramsay for plaintiff.

Doutre, Doutre & Robidoux for defendant.

CIRCUIT COURT.

Montreal, Sept. 13, 1878.

PAPINEAU, J.

PERRAULT V. ETIENNE.

*Community—Renunciation—Medical Attendance—
Liability of heirs for Community Debt notwithstanding Renunciation.*

A claim for medical attendance, though in its nature a debt of the community, may be recovered from the personal heirs of the wife deceased, notwithstanding their renunciation of the *communauté de biens*.

The plaintiff, a physician, sued the tutor to a minor, heir by will of his deceased mother, for professional services rendered to the latter. The tutor had accepted for the minor the personal property of the deceased, but had renounced to the community which existed between the deceased and her husband.

The claim was resisted on the ground that the debt was a debt of the community, to which the minor had renounced.

The plaintiff's counsel cited C. C. 1994, 2003; 2 Bourjon, p. 688; Bacquet, p. 294.

PER CURIAM. The debt is undoubtedly a debt of the community, but it is also a natural debt of the child who has been constituted heir. I might dismiss the action *sans recours*, and let the plaintiff sue the husband, who is the head of the community. But of what use would that be, seeing that by the inventory and renunciation produced, the community is worth nothing? The plaintiff must have judgment.

A. W. Grenier for plaintiff.

Duhamel, Pagnuelo & Rainville for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

CORNELL (plaintiff and contestant in the Court below), appellant; and RICHARD (defendant and opposant in the Court below), respondent.

*Opposition—Payment on Account not Proved in
Original Suit.*

A defendant, after he has contested an account, and judgment has gone against him, will be permitted, on an opposition to the seizure under judgment, to prove a payment which he had failed to prove in the

principal suit, owing to his having been in error as to the date when he made such payment.

The appeal was from a judgment partially maintaining an opposition filed by the respondent. The appellant had obtained a judgment against the respondent for a balance of principal and interest due under an obligation and mortgage. Execution having issued, the respondent put in an opposition alleging that he had not received credit for certain payments on account, made by him before he was sued, and that he had been unable to prove these payments owing to an error of date, which he had only recently discovered. Respondent established by the evidence of plaintiff himself that he had paid \$1,270 at certain dates specified, and his opposition was maintained to this extent, and a deduction of this sum made. The plaintiff appealed, contending that these sums had been accounted for in a settlement made in 1872, and objecting also that the defendant was re-opening under the opposition the *enquête* in the original suit.

RAMSAY, J., dissenting, thought the judgment was incorrect. There had been a suit in which the payments had been in question, and after the respondent had had an opportunity to prove all he could, judgment went for a certain sum, with 12 per cent. interest. There was hardship for the respondent to have to pay such a rate, but the Court had nothing to do with that. The issue was clearly raised as to a general indebtedness. On that there had been a solemn enquiry and a judgment. But now the defendant came in by opposition and said the judgment was wrong because he forgot that he had paid a certain sum. Whether the evidence on this point was explicit or not, it appeared to his Honor that what had been decided in the previous case could not be put in issue again. It was *res judicata*.

CROSS, J., remarked that when the parties went to evidence on the opposition, the respondent proved two payments, one of \$900, and the other of \$370, and he proved them by the oath of Cornell himself. The latter tried to evade the consequences, but still he admitted that there were two payments, for which Richard had not got credit. As to the objection of *chose jugée*, there was not identity of demand. What the respondent set up in his defence to the original action was not identical with what he

set up in his opposition. Therefore, the case did not come under the objection of *chose jugée*. The principle had been laid down that when there came to be uncertainty whether it was *chose jugée* or not, the Court should lean in favor of the doubt. The Court below had given the respondent the benefit of the two payments, and the Court here did not think that judgment should be disturbed.

DORION, C.J., did not think this was a case of *chose jugée*. The point in issue here never came up before. The question was whether a party who had made certain payments on account would be allowed afterwards, on an opposition, to plead what he should have pleaded at first. The general rule was that this would not be allowed, but there were exceptions. Here the Court had proof by the plaintiff himself that he had received more money than he had given credit for. It would be the height of injustice to say that because a man put a wrong date to a payment he was not to be allowed afterwards to correct the error of date. Courts would not encourage parties in such a course, but where there would be great injustice done, as here, the Court would exercise its discretion, and allow the defendant the benefit of the sums which were undoubtedly paid.

MONK, J., said if the judgment in the Court below had pronounced on the two items in question, the plea of *chose jugée* might have been urged, but these items had not been gone into, and the question of *chose jugée* did not arise.

Judgment confirmed.

E. Carter, Q.C., for Appellant.

Davidson & Cushing for Respondent.

JOHN KERRY et al. (plaintiffs in the Court below), Appellants; and LES SŒURS DE L'ASILE DE LA PROVIDENCE (defendants in the Court below), Respondents.

Trade Mark, Name of a Substance Cannot Constitute—Charitable Corporation's Right to Trade.

The term "Syrup of Red Spruce Gum," being only the name of a substance, does not properly constitute a trade mark, and the sale of another preparation, differing essentially in external appearance and composition, under the name "Syrup of Spruce Gum," is no violation of such mark.

This was an appeal from the judgment dismissing the suit brought by Messrs. Kerry &

Co. against the Nuns for infringement of their trade mark, by selling an imitation of Gray's Syrup of Spruce Gum. The Judge of the Superior Court held that there had been no violation of plaintiffs' trade mark, and that the words "Syrup of Spruce Gum" could not properly constitute a trade mark, involving, as they do, only the name of a substance, and plaintiffs had no monopoly of such words. The Judge held that the Nuns had been competing improperly in the market with the plaintiffs, but it was for the Crown alone to prosecute corporations for exceeding their powers, and added that the plaintiffs themselves proved no license or privilege possessed by them to trade. The defendants had brought an incidental demand for damages against the plaintiffs for interference with their sale of Spruce Gum. This was also dismissed, on the ground that although the interference was held to be proved, yet the defendants had drawn the trouble upon themselves by trading in excess of their charter rights.

DORION, C. J., said he found that his firm had formerly acted as counsel for the Nuns in connection with this matter, and he could not take part in the judgment; but as the other four judges were unanimous, the judgment would be rendered.

RAMSAY, J., said the action substantially was brought for the violation of a trade mark—that was the principal object. The plaintiff in the court below brought his action against the Nuns for having used a trade mark, and he sought to obtain damages, and also asked for an account from the Nuns, and that they be restrained from further selling goods marked with this mark. The first question the court had to examine was whether there was a trade mark in the possession of the appellants, and then whether that trade mark was violated or not. With regard to the question whether there was a trade mark validly in the possession of the appellants, the question did not come up so much in this court as it did in the court below, because in the court below there was a cross demand by the Nuns against the appellants for having violated their trade mark. The cross demand was rejected, and there was no appeal taken from that dismissal. The ground on which the incidental demand was dismissed

was, that the Nuns were not a trading corporation, and had no right to have a trade mark. The question now was whether Kerry & Co.'s trade mark was violated by the action of the Nuns in selling a particular kind of spruce gum. What was violation of a trade mark? It was taking the trade mark of another and using it. There was another kind of violation; you might take something that was similar, and present it in such a shape that it would deceive the public, and thus defeat the object of the trade mark. That was precisely what the appellants pretended the respondents had done in this case. They said: You have taken not exactly our trade mark; but you have gone and made another thing like our syrup of spruce gum, and make people buy it instead of ours. The question whether the things were exactly the same did not arise here. If it appeared that the Nuns had made a bottle for the same object, with a sufficient resemblance to deceive the public, they would have been within the law. In this instance, the things were of convenient size, and they had been produced to speak for themselves. [Here the learned Judge held up two bottles, one of each of the syrups, which differed greatly in color and external appearance.] The Court was asked, as reasonable human beings, to say that these bottles could be mistaken for one another. The external appearance was different, and the internal contents were different. That disposed of the most important branch of the case, that is, the special wrong which Messrs. Kerry & Co. had alleged against these ladies. His honor continued, that unless his attention had been particularly drawn to the declaration, he would not readily have observed that there was another branch of damages alleged here of a very peculiar character. The allegation was to this effect: that these ladies being a charitable corporation, and having been incorporated for purposes of charity, could not be subjected to any taxes, and yet carried on the business of apothecaries, and did so to the injury of plaintiffs, and that the plaintiffs had a direct action against the ladies to compel them to pay damages for having thus carried on business. Taking it for granted for a moment that damages had been established, did such an action lie? The code says an action may be brought

where injury has been caused by another's fault. His Honor could not see that the respondents had done the appellants any harm by the selling of this Spruce Gum. It was a remedial preparation, and charitable corporations had never been precluded from making such things. Governments in France interfered when such things came to be an abuse. But the Court was asked here to say to what extent these people were to use their privileges. His Honor did not feel disposed to enter upon this ground at all. He could not conceive that these ladies had at all violated their charter. There was a difference in the things. It was well known there were two trees—one *épinette blanche*, and the other *épinette rouge*. Messrs. Kerry & Co. called theirs, syrup of red spruce gum. There was little gum in the red spruce, while the *épinette blanche* was full of gum. Mr. Justice Cross had made some historical researches, and found that this was a very ancient remedy, and Jacques Cartier, in his first voyage, spoke of having cured the scurvy by an extract of *épinette*—a remedy which had been learned from the Indians. Perhaps it was in allusion to this that Mr. Gray had a wild Indian, half clad, sitting on a stone, in his trade-mark. The judgment appealed from was a good one, and must be confirmed.

Cross, J., cited from Canadian history to show that the remedy sold by the Nuns was well known formerly. He remarked that in his individual opinion the question whether these ladies had the right to trade was sufficiently raised in the case, and as the Court below had decided against them on this point the plaintiffs ought to be allowed the costs on the incidental demand. But this was only his own opinion. Judgment confirmed.

Doutre, Doutre, Robidoux, Hutchinson & Walker for appellants.

Trudel, Taillon & Vanasse for respondents.

DAME ÉMERANCE CHAPLEAU *et vir*, (plaintiffs and defendants *en faux*, in the Court below,) appellants; and ARSENE CHAPLEAU (defendant and plaintiff *en faux*, in the Court below), respondent.

Will—Testator laboring under Delirium Tremens.

A will made while the testator was laboring under

the effects of *delirium tremens*, of which he died a few days afterwards, *held*, invalid.

This was a contest between a brother and sister over the will of a deceased brother, who died unmarried. The sister had been appointed universal legatee, under the will, but the brother attacked the validity of the testament, alleging three fatal defects:—1. That at the date of its execution, the deceased was unable to articulate. 3. That he was not then of sound mind. 3. That the will was the result of suggestions, and did not express the will of the testator. The Court below sustained the attack on the will, and set the instrument aside, on the ground that it had not been made and received in the presence of the witnesses, or dictated by the deceased, as required by law.

DORION, C. J., said the Court here would not pronounce on the question of execution of the will. But the evidence showed that the deceased had been laboring under *delirium tremens*, and was affected at the time by cerebral fever, which prevented him from making a will. He had been brought to the house of his relative for the purpose of getting a will made, and he died three days after. The document prepared by the notary under such circumstances could not be held valid. The judgment would be confirmed, but the *motif* would be changed.

Lacoste & Globensky for appellant.

Doutre & Co. for respondent.

WHITMAN (plaintiff in the Court below), appellant, and CORPORATION OF THE TOWNSHIP OF STANBRIDGE (defendant in the Court below), respondent.

Front Road—Liability of Township to Fence—Demurrer.

An action by a proprietor claiming damages because the Corporation of the Township had opened a public road through his property and left it unfenced: *Held*, improperly dismissed on demurrer.

Damages to the amount of \$197 were claimed by the plaintiff in his action, on the ground that the Corporation of the township had opened a public road through his property and had not fenced it, thus allowing cattle to stray on his land. The defendants demurred, on the ground that by law they were not bound to fence any front road which they opened, and

that there was no ground of action. The demurrer was sustained, and the plaintiff appealed, contending that the municipality of Missisquoi was especially exempted from the operation of the clauses relied on by the defendants, and, further, that the Court had no right to assume that the road in question was a front road.

CROSS, J., dissenting, thought the judgment should stand. The question was whether the Corporation was bound to fence the road. The Corporation, by taking land for their road, had come to be the neighbor of the plaintiff, and the latter did not complain of them for having taken his land. The plaintiff might have complained that they should pay half the cost of the fences.

DORION, C. J., said there was an indistinctness of statement as to the position of the road. If the land of the plaintiff was not touched, he would, of course, have no claim to damages. But he alleged that his land was left unfenced, and it was not on demurrer that defendants could get rid of the action. The fact was alleged that the Corporation of Stanbridge had opened a front road for the second range, plaintiff's lot being in the first range. By the demurrer all the allegations were admitted, and the plaintiff alleged that cattle had been allowed to run over his land, and that he had suffered damage. There was no allegation that the road opened was a front road for the plaintiff's lot. The declaration was sufficient, and the judgment must be reversed, the *considerants* being to the following effect:—Considering that appellant complained in his declaration that the officers and agents of the respondents, acting under the orders and instructions of the respondents, did illegally and without any right or authority, as required by law, open a road to public travel, being a front road for lots 5, 6, 7 and a portion of lot 4 in the second range of the Township of Stanbridge, and that the respondents, by their officers and servants, unlawfully tore down appellant's fences on lot 4 in the first range, and that in consequence of the respondents' wrong, his land is run over by cattle, and that it does not appear by the declaration that the road is a front road for the appellant's land on which the fences were removed, viz., lot 4 in the first range, and that the appellant was obliged to erect new fences.

MONK, J., remarked that when the parties came to the merits, it might appear that the road did not cross the plaintiff's land.

Judgment reversed.

E. Carter, Q.C., for Appellant.

J. O'Halloran for Respondent.

TAKING EVIDENCE IN FOREIGN STATES.

The following paper upon the law and practice in regard to the taking of evidence in foreign States, for use in English courts, was read at the recent Frankfort conference of the Association for the Reform and Codification of the Law of Nations, by H. D. Jencken, an eminent English barrister, who occupies the position of Honorary General Secretary of the Association:—

A question has recently arisen in our Courts as to the admissibility of evidence taken before a British Consul in Berlin, but not on oath; incidentally a remark made by the Master of the Rolls, Sir George Jessel, as to whether perjury would lie in case of false statements made by deponents before a consul abroad, has prompted inquiry, and it has induced me to look into the question of the mode and effect of oaths and declarations made before British consuls abroad, and likewise as to affidavits taken by consuls of foreign States in Great Britain.

The result of my inquiry into this subject has been far from satisfactory; indeed, on closer examination of the practice, as authorized by official directions to consuls-general, consuls, and others holding official positions, it will be found that, underlying all this surface show of authoritative *dictum*, a grave judicial error will be discovered; one of which the jurists of Prussia (the Minister of Justice) at once detected upon the matter of the validity of oaths and declarations taken by and before consuls of friendly States in Prussia being brought before him.

The difficulty which appears to have occurred to the Prussian jurist was one which would present itself to any lawyer. Unless an oath is taken before a competent recognized legal authority, it is self-evident, no offence against the law can be committed in the place where

such oath was administered; it matters not how false, how untrue the statements purporting to be on oath might be, the wrong-doer cannot be punished. To render a person liable for prosecution on the charge of perjury, the rule in all countries is, that the statement so made on oath must be made in the course of a judicial proceeding, before a competent authority, and be (according to our law) material to the issue before a court having competent jurisdiction. To constitute a competent authority, however, the sanction of the State within the territory of which such authority is constituted is necessary. In other words, the magistrate, or authority before whom an oath is made, must be recognized as a competent one by the law of the place where the oath is administered. The essential characteristic, on closer enquiry, will be found to fail in the case of affidavits taken and depositions made before ambassadors, consuls, etc., residing in foreign countries; it follows from this, that an oath administered by such persons has, in fact, no legal force in the country where it is made. One of the primary principles of criminal law is, that crimes are local, that is, they must be inquired into and punished according to the practice of the courts and the law of the land where the crime is committed. As a necessary sequel, in the case of the crime of perjury, committed by false swearing before an ambassador or consul, or their deputies, in foreign countries, the tribunal before which such false evidence is produced has no jurisdiction over the wrong-doer. The person committing the crime of perjury cannot, from what has been stated, be punished under the laws of the State where the alleged perjury has been committed, for the reason that the oath has not been administered by the proper, lawfully constituted authority in such foreign country. Depositions, hence, taken abroad, for use in our courts, do not partake of that solemn character which alone can give them the weight of evidence.

Having thus far stated the difficulties which have presented themselves on investigating this question, it may be convenient to render a brief summary of the law as it now stands.

In the admirable work of Alex. de Miltitz, "*Des Consulats à l'Etranger*" (1639), an epitome will be found of the law and practice

regulating the duties of consuls abroad; but, strange enough to say, the important question of jurisdiction is not even referred to by this able writer, nor by E. W. A. Tuson, in his "British Consul's Manual" (1856); in fact, these authorities assume the competency of a consul to administer an oath. All writers concur that consuls may take affidavits (administer oaths), issue passports, solemnize marriages, and do all necessary notarial acts; but that the State sanction of the country in which these acts are done is necessary, is not even suggested. That lawyers have not been free from doubt is apparent from the many acts of Parliament by the aid of which an endeavor has been made to clothe these consular acts with the sanction of law. Thus we find the 6 Geo. IV, c. 87, s. 20, granting authority to consuls-general, consuls, etc., to administer oaths abroad. This enactment was followed by the 8 & 9 Vict. c. 113, called the "Documentary Evidence Act of 1845;" superseded and enlarged by the 18 & 19 Vict. c. 42. The first section of this latter act provides: "that it shall be lawful for every British ambassador, general consul, consul, vice-consul, etc., to administer in such foreign country or place any oath or take any affidavit or affirmation from any person whomsoever;" and with singular disregard as to the principle underlying statements made on oath, the act further provides: "that every such oath, affidavit, or affirmation, had or done by or before such ambassador, minister, chargé d'affaires, general consul, consul, etc., shall be as good, valid, and effectual to all intents and purposes as if such oath, affidavit, or affirmation or notarial act respectively had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

The Common Law Procedure Act, the 15 & 16 Vict. c. 76 (1852 act) contains a clause (§23) providing for the mode of proving depositions and affidavits, etc., made before a British consul abroad. This mode of proof thus legalized, Mr. Taylor has not hesitated to describe as "absurd." This section provides: "that every affidavit, so sworn by virtue of this act, may be used and shall be admitted in evidence, saving all just exceptions, provided it purports to be

signed by such consul-general, consul, vice-consul, consular agent, upon proof of the official character and signature of the person purporting to have signed the same."

The well-known act entitled: "Lord Brougham's Evidence Act" (18 & 19 Vict. c. 95) likewise deals with this question; but even in this important statute no mention is made as to the competency of a consul to administer an oath in a foreign country so as to render a deponent criminally liable in case of his making false statements. Taylor on Evidence, p. 1308, 7th edition.

The error of our legislation in thus giving so informally administered oaths and affidavits the force or effect of lawfully had and taken oaths and affidavits is indeed startling. In November, 1876, the minister of justice for Prussia issued directions that no foreign consul in Prussia should in future be allowed to administer any oath, or take any affidavit in any matter had before him, for use in any proceedings in any foreign tribunal, or for other purposes. These directions only, however, apply to Prussia; in the other States of Germany, for instance, Saxony (Leipzig), a foreign consul may administer such oaths and take such affidavits. In Russia, France, and many other countries, consuls have this right.

That the gravest complications may arise out of this state of things is self-evident. For instance, in the case of the transfer of a British ship it is necessary to make a declaration of ownership under the Merchant Shipping Act, 1854. MacLachland on Merchant Shipping, pp. 73, 81.

This act (17 & 18 Vict. c. 104, s. 76 *et seq.*) provides: "that such affidavits may be made in foreign countries before a British consul," etc. But in Prussia a British consul is forbidden to take such affidavit; and as far as I understand this act, no provision is contained granting validity to any declaration, affidavit, etc., made before a magistrate or other competent person in such foreign country.

So little attention has been paid to this subject that, on examining some of the principal conventions between the different States of Europe regarding the effect of oaths and affidavits taken by consuls, it will be found that no provision is contained in them for the punishment of a person guilty of perjury. Even the

admirably framed convention between the United States and France (1833), regulating the rights and duties of consuls in the respective countries, is silent on this head. The sixth article of this consular convention provides as follows :

"Les consuls généraux, consuls, vice-consuls ou agents consulaires auront le droit de recevoir dans leur chancellerie, ou bureaux, au domicile des parties, ou à bord des bâtiments, les déclarations des capitaines, équipages, passagers, négociants ou citoyens de leur pays et tous les actes qu'ils voudront y passer."

It will be observed that ample powers are given under this convention ; but it is silent as to the legal effect of oaths, etc., so administered and taken, that is, in regard to the consequences which attach to a person making false statements under oath.

Another phase of this inquiry is in regard to depositions before a commissioner appointed by order of a foreign court of law to examine witnesses residing abroad. The foregoing remarks respecting the validity of an oath, affidavit, or affirmation done or made before a commissioner appointed by order of a court of law. The admissibility in our courts of evidence so taken is a matter of everyday practice, but the legal weight of evidence so deposed to may, I think, be gravely questioned.

To remedy the evil complained of, the intervention of State authority will be needed ; and I venture to suggest that an inquiry be instituted as to the law and practice in different countries in regard to taking oaths and affidavits before consuls and other persons not being magistrates in the country where such are deposed to, and that for that purpose a committee be appointed to gather information and report at the next annual conference of this Association, with instructions to advise this Association as to the best mode of remedying the defect complained of.

CURRENT EVENTS.

CANADA.

THE LEGALITY OF ORANGE PROCESSIONS.—The persons arrested in Montreal on the 12th of July last, on the charge of being members of the Orange Association, and of being about to walk in procession, (*ante* p. 371), have been committed

by the Police Magistrate for trial before the Court of Queen's Bench. The September Term of that Court opened at Montreal on the 24th ultimo, when Mr. Justice Ramsay, the presiding Judge, made the following observations in reference to the case in his address to the Grand Jury :

The duties of grand jurors are now so well understood that it is hardly necessary the Court should do more than call your attention to the terms of the oath you have taken. In a few words, it comprises the whole of your special obligations to society which you represent, and to the persons accused before you. You shall leave none unpresented from fear, favour, affection or reward, and you shall present none for envy, hatred or malice ; but you shall present all things truly. Simple as the duty comprised in these words may appear, solemn is the undertaking to perform that duty ; there are times when it becomes of the greatest importance to be on the watch lest we are led inadvertently by our feelings to deviate from these precepts. Such a time, unfortunately, is the present. The case to which reference has been already made, and to which it is the duty of the Court specially to draw your attention, is of a nature to enlist sympathies or to arouse antipathies that may divert your attention from the real question submitted to you—the question you have sworn impartially to decide.

In the second year of the Queen's reign, considerable discontent prevailed in this Province, which led to proceedings of a character so alarming that it was thought necessary to publish an ordinance "for more effectually preventing the administering or taking of unlawful oaths, and for better preventing treasonable and seditious practices." By the preamble of that Act it was declared that :

"Whereas, divers wicked and evil-disposed persons have of late attempted to seduce divers of Her Majesty's subjects in this Province from their allegiance to Her Majesty, and to incite them to acts of sedition, rebellion, treason and other offences, and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the persons whom they have attempted to seduce and incite the pretended obligation of oaths unlawfully administered ; and whereas divers societies and associations have been of late instituted in

"this Province, of a new and dangerous nature, inconsistent with the public tranquility and with the existence of regular government."

So far as the scope of the Act is to be gathered from the preamble, it appears that the object of the legislature was two fold; 1st, to prevent the administration of illegal oaths, by which effect might be given to traitorous proceedings; and, 2nd, to render illegal divers associations lately instituted in this Province, and of a new and dangerous nature, inconsistent with the public tranquility, and with the existence of regular government. The ordinance, therefore, enacts that, "Any person or persons who shall in any manner or form whatsoever, administer or cause to be administered, or being, aiding or assisting at, or present at and consenting to the administration or taking of any oaths or engagement, purporting or intending to bind the person taking the same to commit treason or murder, or any felony punishable by law with death, or to engage in any seditious, rebellious or treasonable purpose, or to disturb the public peace, or to be of any association, society or confederacy, formed for any such purpose, or to obey the order or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate or other person, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof, by due course of law, be adjudged guilty of felony, &c."

"And every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof, by due course of law, be adjudged guilty of felony, and may be transported for any term not exceeding seven years"

Section 1, therefore, makes it a felony to administer or take an oath binding any one to do or leave undone any of the things just enumerated. If, then, the accusation be presented to you, drawn under this section, it will be neces-

sary that you should have proof before you that an oath to leave undone one of the things enjoined by the statute, or to do one of the things forbidden by the statute, has been taken, and that the accused administered or took such oath.

Section 5 of the ordinance enacts that any engagement or obligation whatever, in the nature of an oath shall be deemed an oath, in whatever form it shall be taken, and, if taken, whether actually administered by any person or not.

These dispositions of the ordinance are copied substantially, it might almost be said, textually, from two Acts of the Parliament of Great Britain—the 37 Geo III., c. 123, and the 52 Geo. III., c. 104—and their interpretation offers no serious difficulty. But the ordinance has a further disposition, which calls for more minute consideration.

Section 6 enacts that:

"All and every society or association now established or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or any agreement for that purpose, be required to keep secret the acts or proceedings of such society or association, or admitted to take any oath or engagement, which shall be an unlawful oath or engagement within the intent and meaning of the foregoing provisions of the ordinance, or to take any oath or engagement not required or authorized by law; and every society or association, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement in consequence of being members of such society or association; and every society or association the members whereof or any of them shall take, subscribe or assent to any engagement of secrecy, test or declaration not required by law: and every society of which the names of the members, or any of them, shall be secret from the society at large, or which shall have any committee or secret body so chosen or appointed that the members constituting the same shall not be known by the society at large to be members of such committee or select body, or which shall have any president, treasurer, secretary or delegate, or other officer so chosen or appointed that the election or appointment of such persons

“to such office as shall not be known to the society at large, or of which the names of all the persons and of the committee or select bodies of members, and of all presidents, treasurers, secretaries, delegates and other officers, shall not be entered in a book or books for that purpose, and to be open to the inspection of all the members of such society or association; and every society or association which shall be composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate or other officer elected or appointed by or for such part, or to act as an officer for such part shall be deemed and taken to be unlawful combinations and confederacies; and every person who, from and after the passing of this ordinance shall become a member of any such society or association, at the passing of this ordinance, shall afterwards act as a member thereof, and every person who, after the passing of this ordinance shall directly or indirectly maintain correspondence or intercourse with any such society or association or with any division, branch, committee or other select body, Treasurer, Secretary, Delegate or other officer or member of such society or association, whether within or without the Province, as such, or who shall by contribution of money or otherwise, aid, abet or support such society, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination or confederacy.”

This enactment has been reproduced in the C. Sta. L. C., cap. 10, with no alteration, except the correction of one or two errors of construction. Now, this law is taken in part from section 1 of the 39 Geo. III., c. 79, and although on a superficial examination it may appear that the ordinance of L. Canada only reproduces the terms of the English Act, it really differs from it essentially. In the first place it is not confined to certain named societies and every other society of a like kind, but it extends to every society or association whatever, “the members whereof shall, according to the rules thereof, or to any provision, or any agreement for that purpose, be required to keep secret the acts or proceedings of such

society or association.” These words are not in the original Act, and if strictly interpreted they lead us necessarily to the conclusion that if two or more persons agree to keep secret any act or proceeding of theirs, however innocent, they shall be guilty of felony. This is evidently not within the intention of the Act, and unless something more than this is established your duty will be a very easy one. But what, substantially, you will have to enquire is whether the five persons accused, or any of them, have taken an oath to do an illegal act, or to leave undone anything they are bound by law to do; or whether they have become members of a society or association whose rules require or admit the taking of an illegal oath, or of an oath not required or authorized by law, or whose rules require the members, or any of them, to take, subscribe, or assent to any test or declaration not required by law, or, further, whether they are members of a society the names of whose members are kept secret or not entered in a book to be kept for that purpose, or in which there shall be any secrecy as to the persons forming the association, its governing body, or its objects.

Having read to you the statute, and having explained in less technical language its general import, the Court trusts you will have little or no difficulty in discriminating whether any case presented to you appears to fall fairly within the scope of the law or not. You will observe that it is not your duty to decide on the merits of the law, or whether it may be exceptionally or unduly severe. Neither are you to arrive at any conclusion unfavorable to the accused, or the reverse from any preconceived opinion as to the nature of an Orange Lodge, or the nature of an Orange Society, Before sending any one here for trial, it is your duty to have reasonable *prima facie* proof that an Orange Lodge is illegal under the Act, and that the accused is a member of it. It is right the Court should draw your attention to the fact that acting as a member brings the party within the law. On the other hand, you will remember that there is no presumption of guilt to be drawn from the fact that any witness has refused to answer with respect to the Orange organization for fear of criminating himself. That refusal is justified under the law, sanctioned by the highest legal authority in

this Province, and any attempt to get round or diminish the effect of that decision will be a disrespect of this Court, which you will be justified in repressing. It will also lead to a waste of your own time.

In these observations the Court has only looked at the question of Orange Association from a strictly legal point of view, but there are other considerations affecting this organization not unworthy your attention, not beyond the limits of, your functions, considerations not unworthy your attention, although you may perhaps arrive at the conclusion that the evidence does not show it to be an illegal association. It tends to a breach of the peace, and not the less so, because the object of the members is not to commit an assault. Its latent mischief consists in this that it is provocative. It is the commemoration of the victory of one party over another in a civil war. Now it may be fairly asked if it is wise, if it is generous and noble to celebrate a triumph over one's fellow countrymen for an event which took place nearly two hundred years ago, and more than three thousand miles away. If it is wise, it is a species of wisdom unpractised by the great conquering nations of the world. Roman triumphs were celebrated not in Britain or in Gaul but at Rome, to gratify the victors, not to humiliate the vanquished, and when a Russian Prince visited the English arsenals the Crimean trophies were veiled. If Irishmen would take the place their many great and generous qualities fit them for among the progressive races of the world, they must make up their minds to abandon the pastime of nagging each other. Probably a false shame prevents either party giving up its pretensions, like school-boys engaged in a foolish quarrel, but the more manly will always be the first to cease to give offence. As an excuse for persistence it is sometimes said that if Orange processions are given up religious processions like that of the Fete Dieu should be abandoned also; but there is no parallel between the two. There is no harm in a procession properly conducted. It is of course possible that a procession might become so inconvenient as to necessitate the constant intervention of the police, just as is the case with ordinary traffic in the crowded thoroughfares of London, but such an interrup-

tion of the streets of Montreal is a theoretical difficulty at the present moment. To put a religious procession on the same footing as a procession to commemorate the 12th of July is simply to display intolerance, and surely those who almost ostentatiously insist on their Protestantism will hardly think it worth their while to throw overboard the doctrine of toleration when it is practically triumphant in the world. One might as well say that a funeral procession should be forbidden.

There is one other consideration which ought to have some weight with Orangemen, and it is that the Queen has discountenanced Orange demonstrations for exactly the reasons now put forth. Naturally the sovereign of Saxon, Norman and Celt can feel no delight in the perpetuation of differences of this sort, and no man truly loyal can feel otherwise than the Queen does on this matter. The present moment, when the daughter of Our Sovereign is about to take up her abode amongst us, in order to draw more closely together the ties of love and affection which unite us to the empire, would seem to be peculiarly appropriate for abandoning a distinction which, I am persuaded, marks no real difference in the sentiment of loyalty which animates the great mass of Her Majesty's subjects, whatever their creed may be.

GENERAL NOTES.

THE LORD CHANCELLOR.—Intelligence has been received by cable that the Lord Chancellor of England has been advanced a step in the Peerage, under the title of Earl Cairns and Viscount of Garmoyle.

RETIREMENT OF THE REGISTRAR-GENERAL.—The first and only Registrar-General of Great Britain, Major Graham, is about to retire. A noble man and meritorious is the gallant Major; and he will take with him from Somerset House honor more than falls to the lot of ordinary civil servants. To him is due the organization of the most perfect vital statistical system in the world; and the great census operations from 1841 to 1871, both inclusive, were under his able superintendence.

The death of Judge Keogh, whose mental derangement was recently noticed, has been announced. It took place at Bonn.

The Legal News.

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WEARING APPAREL.

A point of some interest in insolvency matters came before the Judge of the County Court of Middlesex, (Ont.) a short time ago. The insolvent, one Sanborn, having retained an expensive watch, valued at \$150, an application was made under the 143rd section of the Act of 1875, for an order to require him to deliver up the article to the assignee. The application was opposed, on the ground that this watch, which the insolvent had been in the habit of wearing on his person, came under the head of necessary and ordinary wearing apparel. In support of this pretension, the County Court Judge was referred to the definition of the word "apparel" as given in Worcester's Dictionary and elsewhere, from which it was argued that the word comprised not only clothing, but also such ornamental things as are usually worn. The Judge gave the case serious consideration, and while rejecting the application, viewed it with so much indulgence that he ordered the costs to be paid out of the estate. He pointed out, however, the obvious objection to a pretension such as that put forward on behalf of Sanborn. "For instance," he remarked, "a person perceiving that insolvency was likely to overtake him, might invest a large portion of his funds, or indeed in some cases, he might readily invest all his assets, in the purchase of a costly watch, set with costly jewels, and claim to have it exempted from the control of the assignee, and thus preserve his property from his creditors. Perhaps so gross a case might come within the domain of fraud, and in this way the insolvent might be reached. But it is easy to see how a very large expenditure could be incurred in the purchase of a valuable watch, and secured to the insolvent, if in all cases a watch can be said to be a necessary and ordinary article of apparel. In this case the insolvent's estate will pay 20 cents in the dollar, and previous to his final collapse he compounded with his creditors for 60 cents in the dollar. Some eight months previous to the

composition he became the purchaser of this watch, which he values at \$150. Now was this watch such an article as in ordinary cases would be worn by a person in his condition? I think it is not reasonable that a man pecuniarily situated as he was, should have \$150 invested in a watch. Neither is it shown that there was any necessity for his having a watch at all. Nothing more is urged than the usual convenience of a watch to any one. If this was a common inexpensive watch, I should feel disinclined to accede to this petition. But the words, necessary and ordinary, must be taken to have a relative signification. That is to say, this meaning must be governed by comparison and by circumstances. *Spitzen v. Chaffer*, 14 C.B., N.S., 714, shows that there is a substantial distinction between wearing apparel and necessary wearing apparel. In this case I feel myself compelled to look to the reasonableness of the thing, otherwise a man might, as I have said, invest a very large sum in a watch, or it might be in a diamond pin, or some such article, and claim to have the article exempted, thus opening the door to a fraud upon his creditors."

There are some parts of the world in which people consider themselves dressed *en règle* if they have on a necklace or a watch, and nothing else. Before the courts of those countries, if they have any, Mr. Sanborn's pretension might not appear unreasonable. But as our laws and customs permit insolvents to retain more substantial clothing, we take the County Judge's decision to be a perfectly sound one.

INEQUALITIES OF THE BANKRUPT SYSTEM.

On one of the last days of the Parliamentary Session, in England, Mr. Macdonald placed the following notice on the order book of the House of Commons:—"To call the attention of the House to the inequality of the existing bankruptcy laws; and to move, 'That no alteration of the bankruptcy laws can be satisfactory which does not afford to the wage-earning classes a cheap and easy mode of arranging with creditors, in a like manner as the upper or commercial classes.' " Mr. Macdonald is no doubt puzzled by the strange sight of the wage-earning class struggling and pinching in order to make both ends meet, in other words, to pay

twenty shillings in the pound, while persons in trade can indulge in every luxury and live with the greatest ostentation during the twelve months preceding the collapse, and finally settle their debts at a farthing in the hundred pounds. We agree, however, with the London *Economist*, that "a raising of the standard, not a lowering, is the thing really wanted; the evasion of debts should be made more difficult, not less difficult." "It is quite true," the same journal remarks, "that men of the working classes are under this difficulty, that if they cannot scrape together sufficient to pay the stamp duty and solicitors' charges they cannot avail themselves of the provisions of the Bankruptcy Act. A trader may be quite as insolvent as a bankrupt labourer, and even more dishonest, but if he can meet the needful expense, he can obtain a discharge from his liabilities by filing a liquidation petition, which the poorer man from his very poverty is unable to do. Thus one man may fail for £70,000 or £80,000, and get off scot free without paying a single penny to his creditors; while another man who possibly owes £10 may have to struggle on in the direst poverty, and perhaps have his goods seized in execution besides, until he has paid 20s. in the pound. Mr. Mucdonald's motion curiously marks the very unsatisfactory state of feeling which the existing state of the law and the facility with which the payment of debts can be evaded has produced in the public mind."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 30, 1878.

JOHNSON, J.

KANE v. WRIGHT et al.

Partnership Adventure—Tendering for a Contract—Termination of Partnership Interest.

The plaintiff and another entered into a partnership with the two defendants to tender for some dredging and harbor works. Their tender and supplementary tender were not accepted, and the defendants subsequently took a sub-contract from another person whose tender (supplementary tenders having been asked for) had been accepted.

Held, that the rejection of the tender put an end to the partnership interest of the parties making it, there being no evidence that the rejection was improperly

brought about by the defendants; and the latter were not precluded from taking a sub-contract for their individual benefit for the same work.

JOHNSON, J. This was a very long case, and there were a great many witnesses heard—and a great many letters produced; but after all perhaps the leading facts are few, and the points to be decided are simple. The plaintiff is a gentleman residing in Montreal, and the defendants are Mr. Wright, of New York, and Mr. Moore, of Portland, Me., well known public contractors.

In January 1877, the Quebec Harbour commissioners invited tenders for the construction of some public works about the harbor there—which I need not specify with particularity, except to say that among these works, which were of an extensive character, there was some dredging of a difficult kind. These works were described in the specifications as to be seen at the office of the commissioners, and parties tendering were to furnish the names of two sureties for \$50,000, and deposit an accepted bank cheque for \$3,000.

The important allegations of the plaintiff are that about the 27th January, 1877, at Montreal, he and a Mr. Angus McDonald, and the two defendants, made a partnership, each having one fourth interest—and that the objects of this partnership were to tender for and to construct these works, particularly the dredging; and the duration of the partnership was to be the time necessary for their construction. Mr. McDonald subdivided his share with his two sons—but that is immaterial; and the firm was Moore, Wright & Co., and in that name the tender was made on the 31st of January. Supplementary tenders were afterwards asked for by the commissioners, and notice given to the parties who had tendered, of whom there were several, besides the plaintiff and his partners, and among them, a Mr. Peters.

On the 13th of March, (the supplementary tenders being required by the 26th), the plaintiff and McDonald communicated with the defendants, and sent them a blank form of supplementary tender, which they sent back from Portland to Montreal, to be signed by the sureties, which was done; and it was agreed to reduce the original tender by \$30,000 to \$60,000, and the defendants were empowered to act for the plaintiff and for the firm, and make the sup-

plementary tender on the most advantageous terms that could be got, and to telegraph to McDonald if necessary. The plaintiff lays stress upon the fact that at this stage in the proceedings, the defendants without his or his co-partners' knowledge, gave directions that the answer from the department was to be addressed to Moore, Wright & Co., Portland, Me., and that they somehow got wind of this gentleman, Peters, having the best chance of obtaining the contract; and the fact or the theory upon which the present action is based, is in short that the defendants showed Peters the figures of their tenders so as to enable him to get the contract, and share the dredging with them, cutting out the plaintiff and his co-partners from all participation: That is to say, the plaintiff maintains that while the partnership between himself, McDonald and the defendants still existed, they, the defendants, betrayed the confidence placed in them by their co-partners, and got for themselves alone what all were equally entitled to; and he therefore brings his action of damages for this violation of an essential condition of this as of all other partnerships; and he lays his damages at \$25,000 — measuring them by his share of the supposed profits.

The plea admits the tender and the supplementary tender, and then sets up substantially that the tender made by the defendants and their co-partners was not accepted, and they became perfectly free after its rejection, to take a sub-contract under Peters who got the contract from the commissioners; and that though they appear as co-partners of Peters, that course was taken at the suggestion of the commissioners or engineers to facilitate direct payment to them instead of their being paid through Peters; and they deny all imputations of fraud or false dealing towards the plaintiff and McDonald, adding that though they were not at all held to do so, they actually invited the plaintiff and McDonald to join with them in their sub-contract, but never got their answer until after they had completed their arrangements with Peters, when it was too late to make new ones with the plaintiff or McDonald.

Now I have said that the correspondence and the evidence are very long; but it is obvious that there are only two points upon which the case rests:—

1st. The fraud and false representations to

the harbour commissioners charged against the defendants;

2nd The duration of the agreement as to the tender.

Of course the second depends in great measure upon the first, for if the rejection of the tender made by plaintiff and his associates was the consequence of fraudulent representations by the defendants as charged in the declaration: If they, the defendants, gave the commissioners to understand that they and their associates had withdrawn; if they gave Peters the figures of their tender so as to facilitate his getting the contract, and with a view to their own benefit to the exclusion of their associates; in one word, if they themselves are the cause of the rejection of their own tender for their own personal profit, and to get an advantage over their co-partners, they may be said to have got for themselves what ought to have been got for the partnership, and to have got it improperly—so that they cannot profit by it at the expense of the others.

There can be no doubt that the position of the defendants is impregnable if it is true. If the tender of the plaintiff and his co-partners was *bond fide* rejected, there was an end of the objects of the agreement between them. The plaintiff does not deny this. He admits that the defendants would have had perfect liberty of action after the rejection of their common tender, if that rejection had not in fact proceeded from them, and been suggested for their own individual objects in violation of the rights of the other parties; but he puts his case on the distinct ground of deceit, and consequent profit made by breach of the partnership agreement. I have paid every attention in my power to the evidence, and to the arguments adduced from the correspondence. There was something perhaps to excite Mr. Kane's surprise and even suspicion, until it was explained; but I must say that I feel the weight of evidence is with the defendants. The plaintiff appears to have acted in the most honorable and confiding manner throughout: to have done all that could be expected of him as one of those who tendered—in the way of exerting himself to the utmost for the benefit of those associated with him, and was no doubt disappointed at the result; but it is impossible to condemn these defendants for having withdrawn

the tender, and conspired with Peters to the injury of their partners, and got what they could for themselves, without clear evidence to the point; and here it falls far short of that. It would even seem that the defendants felt for the plaintiff's disappointment, and tried to give them a share along with themselves in the sub-contract with Peters; but that fell through without any apparent fault of theirs. There cannot be a doubt in my mind that the rejection of the first tender put an end to the interest of the parties making it, unless that rejection was deceitfully brought about by the defendants, of which I do not see sufficient evidence.

Action dismissed with costs.

Girouard, Q. C., for plaintiff.

Bethune & Bethune, for defendant.

Montreal, Sept. 25, 1878.

JOHNSON, J.

PRENTICE V. THE GRAPHIC CO.

Costs, Security for—Domicile—Residence—29 C.C.

It is not sufficient, to entitle a defendant to security for costs, to allege that the plaintiff has left his "domicile" in the Province of Quebec.

JOHNSON, J. Two of the defendants move for security for costs. I thought at first that the question would be whether the plaintiff resided in Lower Canada or not, and I gave myself some trouble to refer to notes and authorities on the distinction between domicile and residence. In most of these cases the circumstances have to be looked at to see if the liability to give security exists. The parties here, however, have given themselves the trouble to make affidavits that are of no use, for, on turning to the terms of the motion, I see that the only ground taken is that the party has left his domicile in the Province of Quebec and has now no domicile there. The 29th art. C. C. does not require domicile, but only residence, and though domicile does not exclude residence, residence does certainly not extend to include domicile.

Motion rejected.

J. L. Morris for plaintiff.

T. W. Ritchie, Q.C., for defendants, Simpson and Stephen moving.

BRAUDRY V. THE CITY OF MONTREAL.

Assessment—Representation by Agent—Appeal from Recorder—Jurisdiction.

1. The Assessors of Montreal may, in their discretion, hear complaints made by the agents of the proprietors interested.

2. On an appeal from the judgment of the Recorder in an assessment case, the Court cannot hear evidence and give a final judgment on the merits.

JOHNSON, J. The petitioner was assessed on certain real estate for 1877-8, and petitioned for a reduction of \$664.80 as required by the statute, and sent his agent to the office of the assessors to represent him by special power of attorney, and he was examined by the assessors, and they revisited the property and made certain reductions. Then the case came before the Recorder's Court in due course under the 77 sec. of the 37 Vic. c. 51, sub-section 4, and the learned Recorder refused to hear the proof on the ground that the party complaining had not appeared before the assessors as required by the law. The assessors were public officers, and took the evidence and examination of the agent in their discretion, and I do not see that they did wrong. The agent and manager of a large estate of immense value like this would probably know more about the matter than the owner. Therefore, the learned Recorder ought, I think, to have heard the evidence. The point was before Mr. Justice Torrance before, and he decided it in the same way; but that is not the difficulty in the case. The Act says that any one dissatisfied with the judgment of the Recorder in such matters may come here by summary petition, and all the papers are to be sent before this Court, and after hearing the petitioner, the Court is to give such order as to law and justice shall appertain. Acting upon this, or upon the view he took of this provision of the statute, the plaintiff's attorney got a day fixed for proof; though I had some doubts at the time about it, I allowed the witnesses who were present to be examined—subject, however, to the objection made by the counsel of the Corporation. I have now considered the case, and I think the only order I can make is to send the case back to the Recorder to hear the evidence and the case on the merits. The statute gives me no distinct power to hear and determine the case upon the evidence; it only says the papers are to be sent here and the petitioner is to be heard. The general words, "make such order as to law and justice may appertain," do not include the power of giving final judgment on the merits and proof. The

Recorder is, I think, the proper person to deal with this subject, and the order is that that officer should proceed after notice to the parties, as provided by the statute, to hear the evidence and give his judgment on the petition for reduction.

A. Dalbec for petitioner.

R. Roy, Q.C., for defendants.

Montreal, Sept. 30, 1878.

RAINVILLE, J.

GRAND TRUNK RAILWAY CO. v. THE CITIZENS' INSURANCE CO.

Guarantee Bond—Negligence.

An employee of the Grand Trunk Railway left a sum of \$22,000 in an open bag in his room while he went to lunch. He had a desk with locked drawers and a strong metal box in the room appropriated for his use. There was also a safe vault in the building. The money disappeared while he was at lunch. *Held*, that it was for the defendants to prove that the money had been stolen, and even if such proof had been made, there was fault and negligence on the employee's part, in failing to lock up the money, sufficient to bring the loss within the terms of the guarantee bond cited below, and his employers were entitled to recover.

RAINVILLE, J. The plaintiffs claim from the defendants the sum of \$22,077. By their declaration they allege that on the 1st of April, 1869, the defendants issued a policy in their favor for \$25,000, guaranteeing David Faulkner, then in the employ of the plaintiffs as paymaster. That on the 22nd June, 1877, while this policy of assurance was still in force by renewals, Faulkner received a check for \$22,489.45, which he cashed at the Bank of Montreal, but had not remitted this sum, with the exception of \$411.65, leaving a balance of \$22,077, for which he had not accounted. That under the policy in question the defendants are responsible for this money, and the plaintiffs therefore conclude that the defendants be condemned to pay them said sum. To this action the defendants plead that in fact Faulkner had received the money from the Bank, that he took it to a room appropriated to his use in the plaintiffs' offices, that he put it in his desk in said room, this place being as safe as any other in said office, and being where he was accustomed to put sums of money received by him as paymaster, and this to the plaintiffs' knowledge. That by the custom and rules of the plaintiffs, Faulkner had a right to a certain

time in the middle of the day to take his lunch, and that on the day in question, after having thus put away the money, he left his office, to go to lunch, and locked the door. That on his return after a short absence, he found the door of his office unlocked, and \$22,077 had been stolen. That Faulkner acted with all requisite prudence, and if the plaintiffs suffered a loss it was through their own fault in not providing a safe place for the deposit of moneys which Faulkner might have in his hands. To this plea the plaintiffs answered specially that Faulkner had not followed the rules of the company; that he had acted imprudently in leaving so large a sum in his room; that he had at his disposal a metal box in which he might have deposited the money; that he had also a desk with lock drawers, where he might have put it, and, lastly, that there was a vault in the building where he was bound to place moneys that he received. On the issue thus joined the parties went to evidence, after giving admissions of the principal facts up to the time of the alleged theft. The defendants' evidence consists chiefly in the deposition of Faulkner, who establishes the facts as he related them at first, that is to say, that he had been the victim of a theft. The plaintiffs on their side have proved the facts alleged in their special answer, that is, that there was in Faulkner's room a lock desk; that he had a strong metal box for his exclusive use, and that there is a safe vault in the building occupied by plaintiffs. One of the witnesses states that Faulkner had the key of this box, and that he gave it to him only after his discharge, and another establishes that it would have taken ten or fifteen minutes to open this box by force, and that it could not have been done without making considerable noise. Such are the facts of the case. Let us settle first the legal position of the parties. To what were the defendants bound by the policy? Did they guarantee only the fidelity and honesty of Faulkner, or did they guarantee his acts and faults? Let us see the terms of the contract. It guarantees that "the said *employee* shall honestly, diligently, and faithfully discharge and transact the duties devolving upon him... and shall faithfully account for, and pay over to the said Railway Company all such moneys, as he, the said *employee*, shall receive for or from the said Company.... and in default thereof,

that the said Company (defendants) shall indemnify the said railway against all loss and damage, costs and expenses which the said Railway Company shall sustain or incur by reason of any act, matter or thing whatsoever, done or committed or omitted to be done by the said employé in or arising out of his said employment, and for which the said employé shall be liable by law, to indemnify the said Railway Company." The defendants in the terms of this contract are therefore bound as sureties of Faulkner, and responsible in the cases in which Faulkner would be. They are liable therefore for his acts and faults, whether of commission or omission, as well as for his fidelity. Now, what is the responsibility of Faulkner? It is regulated by Arts. 1072 and 1200 of our Civil Code. Art. 1072 says the debtor is not bound to pay damages and interest when the inexecution of the obligation is caused by *cas fortuit* ou *force majeure*, without any fault on his part. Art. 1200 says when the thing perishes or the delivery becomes impossible, without the act or fault of the debtor, the obligation is extinguished. The debtor is bound to prove the "*cas fortuit*" which he alleges. (His Honor cited Demolombe on Obligations, T. 1, No. 560; T. 5, No. 765-769, and Larombière, T. 1, p. 537, and continued :) It is in accordance with this doctrine that I decided the case of *Soulière v. Lazarus*, reported in Lower Canada Jurist, Vol. 21, p. 104. In that case I gave judgment in favor of defendant, who was a pawnbroker, because he proved that he had guarded the things with the care of a good father of a family, and that the theft took place under circumstances which no human prudence could foresee. It was on the same principle that the case of *Martin & Gravel* was decided by the Courts of this country, and even by the Privy Council. From the exposition of these principles, it is easy to conclude that the procedure in this case is perfectly regular, and that the defendants' objection that the plaintiffs were attempting to make a new action by their special answer, in alleging facts of negligence on the part of Faulkner—facts which should have been alleged in the declaration, is unfounded. Why, in fact, should the plaintiffs have answered in advance a plea which might not have been filed? It was incumbent, therefore, on the defendants to prove that the sum in ques-

tion had been stolen, and the theft had taken place without any fault on Faulkner's part. To prove the theft, the defendants have only the testimony of Faulkner, who is not an incompetent witness, but who is greatly interested in the suit, because the defendants have a recourse against him if they are condemned. His interest, according to Art. 252, C. P., affects only the degree of credit to be accorded to his testimony. I must, therefore, appreciate this evidence, and I cannot find legal proof of a theft in the mere evidence of Faulkner, destitute as it is of all proof of circumstances. I have no legal proof, though I have a moral conviction, and though I have no doubt of the honesty and fidelity of this unhappy Faulkner. But, supposing that the theft was proved, I have evidence, even according to Faulkner's own account, that he acted with imprudence, and that if a theft was committed it was the result of his fault. It is sufficient to state the fact of a man having a desk locking with a key, a metal box for his exclusive use also locking, and a safe in the building, leaving on the floor of the room, in a mere bag, not closed, a sum of \$22,000, and quitting the room for 30 or 40 minutes, to establish both imprudence and negligence. Did he lock the door of his room? He swears that he did, but when he returned the door was open, without its having been forced. It might have been opened with a false key. But it is just this that shows the imprudence of Faulkner. I am of opinion that the defendants have not proved their plea of *cas fortuit*, and the plaintiffs must have judgment.

G. Macras, Q. C., for plaintiffs.

Abbott, Tait, Wetherpoon & Abbott, for defendants.

COURT OF REVIEW.

Montreal, Sept. 30, 1878.

JOHNSON, TORRANCE, RAINVILLE, JJ.

DEPUIS V. RAGINE.

Sale to two Persons Successively—Possession—Art. 1027 C. C.

When a party has obliged himself successively to two persons to deliver to each of them a moveable article, that one of the two who, in good faith on his part, has been put in actual possession, is preferred and remains owner of the thing, although the purchase by the other was anterior in date.

JOHNSON, J. This suit began by the plaintiff revindicating as his a piano in the hands of the defendant. His title was a purchase of the instrument from a Madame Fournier on the 13th April, 1877. He was met by a plea alleging that on the 13th November the defendant had bought the piano from the same vendress, and had then got, and since kept possession of it. The plaintiff answered that his purchase had been anterior to that of the defendant; that the seller had no power to sell to another and the second sale was fraudulent and simulated. The judgment dismissed the plaintiff's action on the ground that the first buyer never got possession, and the second one did, while no bad faith was proved against him. I have not the slightest doubt that this is a correct judgment, and such is the unanimous opinion of the Court. Of course, if there were fraud on the defendant's part it would vitiate his possession, which is, however, under the circumstances, of itself title until the contrary is proved. The article 1027 clearly applies, and the plaintiff never had a right to revindicate at all, his recourse being evidently against his vendress only. I may add, that in my view, according to the evidence, it may be doubted whether it was ever contemplated that the plaintiff should get possession at all. Judgment confirmed. I may observe that this is not the case of purely and simply title by possession acquired from a non-proprietor. It is the case of the second purchase from the same vendor, which is exceptional, and provided for by the article in question.

Judgment confirmed.

De Lorimier & Co. for plaintiff.

Forget & Forget for defendant.

PARTNERS—CLAIM TO PROFITS MADE IN SEPARATE BUSINESS CONTRARY TO COVENANTS.

The Court of Appeal has, in the case of *Dean v. McDowell*, (31 L. Rep. N. S. 862), dealt in a question of extreme importance in the Law of Partnership. From the facts of that case it appears that the plaintiffs and defendants entered into partnership as salt merchants and brokers, and by the articles of partnership mutually covenanted not to engage, alone or with any other person, directly or indirectly, in any trade or business except upon the account and

for the benefit of the partnership. Two years before the expiration of the partnership by effluxion of time, the defendant purchased the business of a firm of salt manufacturers, and kept the matter secret from plaintiffs, putting his son into the business so purchased till the expiration of the partnership, when the defendant openly entered into the business of salt manufacturing, which was carried on in the name of the firm from which he had purchased it. The salt manufactured by the latter firm continued to be sold on commission by the plaintiffs' firm till the expiration of the partnership, from which time the defendant sold the salt himself, without employing a broker. The plaintiffs did not discover the trading by the defendant till after the expiration of the partnership, whereupon they filed a bill to make the defendant account to the partnership for the profits made by him in the other business during the partnership, and they subsequently brought an action against him in the Chancery Division, claiming that his interest in the other business formed part of the partnership assets. The suit and action were heard together by the Master of the Rolls, who was of opinion that the plaintiffs had no right to an account of the profits, but that, as the defendant had committed a breach of his covenant, the bill in the first suit must be dismissed without costs; and that the claim in the second action being extravagant, there must be judgment in it for defendant with costs. His Lordship pointed out that two clauses relied on by the plaintiffs merely amounted to this, that the defendant would devote himself diligently to his business and not engage in any trade except the partnership business. There was, however, no covenant that, if he violated these clauses, he was to account to the partnership for the profits made by him. The plaintiff appealed. In the argument on appeal a number of cases was cited. It will suffice for our purpose to touch upon a few of them.

The bill in *Somerville v. Mackay* (16 Ves. 382) alleged that the plaintiff entered into an agreement with the defendant for shipping goods to Russia upon their joint account, one of the terms of the agreement being that neither of them should send any goods upon their separate accounts to A. and Co., or to any other person in Russia. The bill prayed that the plaintiff

might be declared entitled to a moiety of the profits of all goods sent by the plaintiff and defendant, or by the defendant separately, to Russia, consigned to A & Co., or to any other person; and that an account might be taken of all goods sent upon the joint account, or by the defendant upon his private account, to such consignees. The defendant put in an answer which admitted the agreement, but denied that its effect was to prohibit him from so trading on his separate account. A motion was subsequently made, calling upon the defendant to produce his books and papers in which the accounts were contained. Lord Eldon put the result of the case thus: The plaintiff contends that the meaning of the partners was that no trade should be carried on with Russia except on the joint account; alleging that the defendant did, in fraud of that agreement, and concealing the fact, carry on a separate trade with various persons, insisting that this conduct gave the plaintiff a right to a moiety of the profits. The course taken by the defendant was not to demur or plead, but to state by answer that, according to the true construction of the letters containing the terms of the agreement, he had full liberty to carry on this separate trade; that afterward, not choosing to rest upon that any longer, he carried it on with the leave of the plaintiff. His Lordship thought it was by no means clear as to the conclusion of fact that the defendant had any right to trade with other persons, but was of opinion that he had no right to trade separately with A. & Co. He mentioned, however, that if the answer had contained a clear, positive, unequivocal averment of the plaintiff's acquiescence and permission, the question whether the defendant was bound to make the discovery would fairly arise. This decision is useful only by reason of the side light which it throws upon the question under discussion.

Burton v. Wookey (Mad. & G. 367) is an authority for the proposition that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuance of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The plaintiff and defendant, who keep a shop, were in partnership to deal in *lapis calaminaris*. Instead of paying ready money the defendant sup-

plied to the sellers goods from his shop, and in accounting to his partner charged as though he paid cash. "The defendant," said Vice-Chancellor Leach, "stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis* he obtained it by barter of his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff;" an account was decreed against the defendant, viz, an account of the profit made by the defendant in his barter of the goods. A temptation, however, to the abuse of partnership property is not sufficient to induce the Court to interfere by injunction. Thus when all the partners in a publication except one were also partners in a rival publication, an injunction, to restrain the using of the effects of the former partnership to assist the latter in consideration of an annual sum, was refused. But in this case there was an agreement permitting the use on those terms: *Glassington v. Thwaites*, 1 S. & S. 124.

The question with which we are concerned was definitely raised in *Russell v. Austwick* (1 Sim, 52). In that case A, B, C, and D, were common carriers carrying from L to F, a separate portion of the road being allotted to each. It was stipulated between them that no partnership should exist *inter se*. A for himself and the other partners agreed with the Mint to carry coin from L to F, and afterwards made another agreement with the Mint to carry other coin to places not on the road. B, C, and D, upon discovering this circumstance, claimed a share in the profits of the latter agreement. In carrying out this latter agreement it would be occasionally necessary to proceed for a short distance along the road from L to F. On behalf of the defendant it was argued that this was not a case of partnership as between the parties, though it might be as regards the public. The plaintiffs on the other hand admitted that the common concern had no connection with the provincial roads which were the occasion of the second agreement, and it was not upon that ground they claimed to participate in the profits. But they insisted that the second agreement was entered into by the officers of the Mint as connected with and a continuation of the first agreement, and in confidence of the responsibility of the parties to the first agree-

ment. Vice-Chancellor Leach did not think that the testimony of the officers of the Mint was so pointed upon this subject as it might have been, but he was of opinion that it was sufficiently plain that the defendant did not apprise them that he was trading for himself in exclusion of the plaintiffs, and that upon the settled principles of equity he could not exclude them from the same proportion of profits as they were entitled to under the first agreement. A declaration was accordingly made that the second agreement was to be considered as made on account of the several parties interested in the first agreement in the proportions in which they were entitled under the first agreement, and accounts were taken accordingly.

Gardner v. McCutcheon (4 Beav. 534), was a motion to restrain the defendant from receiving certain wools. The defendant was part owner and master of a ship, which he sold at Sidney. Soon after the sale he made large purchases of wool, which were consigned to England. The plaintiffs were also co-owners of the ship, and were all interested in the common adventure. They insisted that the wools in question were purchased with partnership property and on the partnership account. They, therefore, claimed the wool as partnership property. For the defendant it was contended that, besides acting as master of the ship, and trading on the joint account, he had a right to trade and did trade on his separate and private account, and that he purchased the wool with his own effects. As a general rule there is no doubt that the master of a ship is bound to employ his whole time and attention in the service of his employers, and that a partner in trade has no right to employ the partnership property in a private speculation for his own benefit. The defendant, however, alleged a custom as making it lawful for him to carry on private trade, and set up acquiescence on the part of the plaintiffs. "As to the alleged custom of trade," said Lord Langdale, "I could not, even if it were uncontradicted, which it is not, pay much attention to it on the present occasion. The master of a ship is an agent bound to give all his time and attention to his principal. In this case the duty of the defendant as master was, when the ship was employed on a trading adventure, to act for the common benefit of the owners, and when the

ship was freighted or chartered, to obtain freight on the best terms he could for the owners, free from all bias of separate interest on himself, or of leave given to himself by the charterers to trade for himself; and I think it will be very difficult to support a custom, which, if illegal, as alleged, would entitle him to trade for himself separately, when it was his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own interest in competition with the joint interest, an option to give the advantage to himself whenever he pleased, without the knowledge of his co-owners, and without giving them notice of his proceedings in this respect; a custom also which would make it valid for a person in the relation of co-owner or partner, having complete control over the ship which was partnership property, to employ it at the joint risk for his own private benefit.

The Master of the Rolls had said, in *Dean v. M'Dowell*: "The mischiefs of his and the defendant engaging in business are two-fold. It may be that it diverts his mind from the partnership business, and takes away his time and attention, which did not happen in this case; or it may be that it makes him liable for the losses of the other business, and may involve him and damage the partnership in which he is engaged; and therefore, the other parties have an option of intervening by injunction, and that has been the remedy usually adopted. Those are the two remedies. But ever since the Court of Chancery existed, till it was abolished, no one ever heard of such a bill as this. That is pretty good proof that there is no such equity." His Lordship also went upon the words of the clause, considering the covenant as a negative and not an affirmative one. In the Court of Appeal great reliance was placed on the case of *Somerville v. Mackay*, 16 Ves. 382; but as Lord Justice Cotton pointed out, the plaintiff and defendant in that case had agreed to enter into a joint adventure or partnership, for the purpose of exporting goods to Russia, and there was a special provision that the partners should not, on their separate account, export goods to the country or to the particular person named. The defendant, nevertheless, had exported goods to Russia and to the person named. "In that case, there-

fore," said his Lordship, "the business in which he had engaged contrary to the partnership articles was within the scope of the partnership. It was partnership business except for his attempt to withdraw it from the partnership contract, and to get the profits of it for his own benefit." That case, however, the Court of Appeal held had no bearing upon the present case, where the business in which the defendant engaged, was in no way within the scope of the partnership. The same learned judge summed up the law in the following succinct terms: "There are clear rules and principles which entitle one partner to share in the profits made by his co-partners. If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly, cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership. Again, if he makes any profit by the use of any of the property of the partnership—including, I may say, information to which the partnership is entitled—then the profit is made out of the partnership property, and therefore, of course, it must be brought into partnership account. So, again, if from his position as partner he gets a business which is profitable, or if from his position as partner he gets an interest in partnership property, or in that which the partnership requires for the purposes of the partnership, he cannot hold it himself because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account." It will be noticed in the present case that there was no doubt whatever as to the fact that a breach of covenant had been committed; but a doubt did exist respecting the remedy. The lucid judgments of the Master of the Rolls, and the Court of Appeal will render the existence of such a doubt impossible in the future.—*The London Law Times*.

APPOINTMENTS.

An Extra of the *Canada Gazette*, Oct. 9, contains the following judicial appointments:—Hon. H. E. Taschereau to be a *puisné* Judge of the Supreme Court, *vice* Hon. J. T. Taschereau, resigned; R. L. Weatherbe, of Halifax, to be a Judge of the Supreme Court, of Nova Scotia; Hon. M. Laframboise, of Montreal, to be a *puisné* Judge of the Superior Court, District of Gaspé; H. T. Taschereau, of Quebec, to be a

puisné Judge of the Superior Court; Archibald Bell, of Chatham, to be County Court Judge, County of Kent.

DIGEST OF ENGLISH DECISIONS.

Acceptance.—See *Contract*, 3.

Account of Profits.—See *Partnership*, 1.

Accumulation.—See *Will*, 2.

Acquiescence.—See *Principal and Agent*.

Action.—See *Husband and Wife*, 2.

Ademption.—See *Will*, 5.

Adjacent Support.—See *Damages*.

Administration.—See *Mortgage*, 1.

Advancement.—See *Annuity*, 2.

Advocate.—See *Attorney and Client*, 1.

Affidavit.—See *Solicitor*.

Agent.—See *Principal and Agent*.

Agreement.—See *Contract*, 2.

Annuity.—1. Testator gave some annuities, and then bequeathed his personal estate not specifically disposed of to trustees, "to stand possessed thereof upon trust, out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable, and subject thereto" upon other trusts. The income of the personal estate was less than the amount of the annuities.

Held, that the deficiency should be made up out of the capital.—*In re Mason. Mason v. Robinson*, 8 Ch. D. 411.

2. By a deed of separation made in 1860, between M. and his wife, he covenanted to pay each of his six daughters an annuity of £200, to cease, in each case, if M. and his wife should come together again. The wife died in 1871, and M. in 1874, the latter intestate. They had not lived together again. *Held*, that the annuities paid during M.'s life were not advancements, and that the value of the annuities at the death of M. should be brought into hotchpot.—*Hatfield v. Minet*, 8 Ch. D. 136.

Anticipation.—See *Husband and Wife*, 1; *Married Women*, 1.

Appointment.—See *Settlement*, 2.

Arbitration.—The plaintiff and the defendants, G., N., and F., all British subjects, entered into partnership articles for carrying on business in Russia, with the head office at St. Petersburg. The articles were in the Russian language, and registered in Russia. G. and N. had the privilege to ask back their capital within a year; and, if their demand was not satisfied within a month, they could wind up the firm. "In case of any disputes arising between the parties, ... such disputes, no matter how or where they may arise, shall be referred to the St. Peter-

burg commercial court. . . . The decision of such court shall be final." G. and N. duly demanded their capital, and took steps in Russia to secure it by winding up proceedings. The plaintiff thereupon began an action in England, alleging that there were three parts to their agreement, all executed in England, although one was translated into Russian, and by one of the English parts he was to have compensation for the withdrawal of G. and N.; that the proceedings for winding up were taken without his knowledge and consent; and that they were invalid, and not according to Russian law. He claimed a dissolution, compensation according to the English agreement, and the appointment of a receiver in England. Defendants moved for a reference of all matters to St. Petersburg. *Held*, that the agreement in the articles to refer was a good arbitration clause under the Common Law Procedure Act, 1854, and a stay of proceedings was ordered to await the result of proceedings in the Russian court.—*Law v. Garrett*, 8 Ch. D. 26.

Attorney and Client.—1. Shipowners sued the charterers for not discharging the cargo according to the charter-party, and in a subsequent action the charterers resorted to their remedy over against the merchant on the contract of sale. *Held*, that correspondence between the charterers and their solicitors in the first action, and between their solicitor and the shipowners' solicitor and relating to the questions in the second action, were privileged, and need not be produced in the second action.—*Bullock v. Corry*, 3 Q. B. D. 356.

2. In an action by a company against its former engineer for money wrongly charged to it in the final account with him, the defendant applied for inspection of three documents scheduled in the plaintiff's affidavit of discovery, and consisting of shorthand notes of conversations between an officer of the company and the chimney-sweep, and between the chairman of the company and the present engineer, and a statement of the facts drawn up by the chairman, all prepared for submission to plaintiff's solicitor for his advice as to their action, two of which had already been submitted to him. Refused, on the ground that the documents were privileged.—*The Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315.

Auction.—See *Sale*, 3.

Average.—See *Shipping and Admiralty*.

Bank.—1. A firm had an account at a bank, and the individual members, among whom was the defendant, also had accounts there. Each member could draw on the firm account. One member of the firm died, and the defendant was one of the trustees of his estate. Previous to the death, the defendant had transferred funds from the firm account to his own account. The defendant purchased certain property, and got the bank to allow him to overdraw his account, on deposit of the title-deeds thereof. On proceedings by the bank to enforce payment of the balance out of said property, the other trustees of the deceased partner claimed a first lien on the property, as having been bought in part with trust-money improperly transferred to his own account by the defendant. The bank had, in fact, no knowledge that such was the case with the accounts, and did not know the defendant was a trustee. The contention that the bank was bound to know whether the transfer was proper and authorized, *held* not maintainable.—*Backhouse v. Charlton*, 8 Ch. D. 444.

2. The plaintiff bank, established in Lima, arranged, in 1871, with the G. company, in London, to draw on the latter to the extent of £100,000, the credits to be covered within ninety days by other bills furnished by the plaintiff bank. In 1875, the G. company was in difficulties, and on March 3 arranged for a loan from the defendant bank, on the basis that the latter should discount certain remittances from the plaintiff bank then *en route*, and which were expected to arrive on or before the 17th. Before their arrival, the defendant bank agreed to the proposition, and chose as agents to receive the securities on their arrival one S., managing director of the G. company, and another. The money was lent between the 3d and the 5th. On the 16th there arrived remittances from the plaintiff bank, and S. took them to the defendant bank, and G., the general manager thereof, and who had formerly been managing director in the G. company, and knew of the arrangement of 1871, selected a bill of exchange for £1,000 and a box of gold eagles, the bill of lading for which, with said bill for £1,000, was delivered to him for his bank. The next day, the G. company suspended, and was finally wound up. *Held*, that the property in the bill of exchange and the box of eagles had passed

from the plaintiff bank, and there could be no recovery.—*Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 180.

Bankruptcy.—See *Execution*; *Partnership*, 3; *Sale*, 4.

Bequest.—B. died in 1628, leaving a will containing a bequest of £1,000 for "the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge.... And my will is, that, in bestowing.... my goods to the poor charitable uses, which is, according to my intent and desire, those of my kindred which are poor, aged, impotent, and any other way unable to help themselves, shall be chiefly preferred." The income from the charity fund became very large. *Held*, that the bequest was a charity; that the objects of it were primarily the kindred of the testator actually poor; and if, after such were provided for, something remained, it should be applied to the relief of poor persons in general, by the doctrine of *cy-près*. A well-to-do person among the kindred could not take, although by comparison "poorer" than some of the kindred. *Dictum* of WICKENS, V. C., in *Taylor v. Gillam* (L. R. 16 Eq. 581), criticised.—*Attorney-General v. Duke of Northumberland*, 7 Ch. D. 745.

Bill of Lading.—See *Bank*, 2; *Sale*, 2.

Bill of Sale.—See *Sale*, 4.

Bills and Notes.—A check had been given for a debt, when a trustee or garnishee process was served upon the debtors, whereupon they ordered payment on the check to be stopped. The check had not been presented. *Held*, that the stopping of payment of the check revived the debt, and the debt was held by the trustee process.—*Cohen v. Hale*, 3 Q. B. D. 371.

Bonus.—See *Will*, 5.

Boundary.—See *Landlord and Tenant*, 2.

Burden of Proof.—See *Slander*.

By-laws.—See *Railway*, 2.

Cancellation of Stock.—See *Company*, 1.

Carrier.—See *Common Carrier*.

Causa Proxima.—See *Negligence*, 1.

Charity.—See *Bequest*; *Trust*, 1; *Will*, 4.

Charter-party.—A charter-party began thus: "A 1½ Record of American and Foreign Shipping Book, London, 4th Sept., 1876. Charter-party. It is mutually agreed between the owners of the ship..... newly classed as

above..... and B. Newgass & Co.," &c. At the above date, the ship was on record classed "A 1½," as above, but subsequently she was declared unseaworthy by the agent of the Shipping Association, and said classification stricken off. In an action by the owner against the charterer for refusing to load the ship, *held*, that the above statement was simply a warranty that the ship was classed in said record A 1½ on said date, and not a warranty that the classification was correct, or that she should continue of that class.—*French v. Newgass*, 3 C. P. D. 163.

Check.—See *Bank*, 1; *Bills and Notes*.

Collusion.—See *Judgment*.

Common Carrier.—See *Railway*, 1, 3.

Company.—1. In 1860, the N. Company, limited, was formed to insure lives and injuries to health, and "generally" to effect such lawful insurances of all kinds as might "be determined upon by a general meeting" of the company. In 1872, a general meeting voted to add fire insurance to the company's business, and to issue new shares, called B shares, for this purpose. This was to form a separate department, and the assured under it were to be confined in their remedy to the B shares. Eminent counsel afterwards advised the company that this proceeding, and the issue of the B shares were *ultra vires*; and a B shareholder accordingly got an order from chancery removing his name from the list of shareholders. An arrangement was then made by the N. company to form a new company for the fire business; and it was agreed between the N. company and the new fire company that the latter should take all the assets and assume all the risks and liabilities of the old fire department; that the fire company should issue its shares to the N. company and the other holders of the B stock, and credit them with the amounts paid thereon, and the N. company should cancel all the old B stock. The appellant, a B stockholder, took stock in the new fire company, got credit for his B stock, and the latter was cancelled. Afterwards, on an order to wind up the N. company, a fire-policy holder, who had insured in the N. company previous to the formation of the fire company, moved to place the appellant on the list of contributories in respect to his B shares. *Held*, that the issue of the B shares was not *ultra vires*; and that although the cancelling of the appellant's B shares in the formation of the new company was also valid, yet that, as to creditors of the N. company, whose rights had attached previous to such cancelling, the appellant was liable as a contributory.—*In re Norwich Provident Insurance Co. Bath's Case*, 8 Ch. D. 334.

The Legal News.

VOL. I. OCTOBER 19, 1878. No. 42.

THE IRISH BAR.

It is stated that students who are desirous of being called to the Irish Bar, are required to keep a number of terms at one of the London Inns of Court, and also to pay certain fees which go into the funds of the Inns. But, notwithstanding this keeping of terms in England and contribution to English Bar funds, Irish barristers are not recognized by the London Inns, nor admitted to practice before the English Courts. An effort has been made recently to introduce reciprocity, but it has proved a failure. A proposal was made by the Benchers of King's Inn, Dublin, to admit English barristers to practice before the Irish Courts, on condition of a similar privilege being accorded to Irish barristers wishing to practice in England. It seems, however, that few or no English barristers are desirous of appearing in the courts of the sister isle, and the committee of the four London Inns of Court, believing that the advantages of such an arrangement would be all on the side from which the offer proceeded, rejected the proposal.

SELF-CRIMINATION.

A good deal has been heard lately about witnesses declining by their answers to furnish evidence against themselves. While the point is engaging attention, reference may be made to a somewhat dramatic incident which occurred a short time ago in a court of Tennessee. In a prosecution for murder, an over-zealous Attorney-General, with a view to establish that a foot-print, observed near the scene of the murder, was made by the prisoner, caused a pan of soft mud, which was proved by a witness to be of the consistency of the mud where the track was made, to be brought into court, and the prisoner was asked to put his foot in it. In complying with this invitation he might have done so in a double sense. At all events, the case was carried, on a writ of error, to the

Supreme Court of the State, and that tribunal has held that, notwithstanding the trial court told the prisoner, he need not put his foot in the mud unless he chose to do so, the fact that the mud was brought into court, and the prisoner asked to put his foot in it, was calculated to influence the jury improperly against him, and was, therefore, error, for which the verdict against the prisoner should be set aside. The desired evidence might probably have been obtained without objection from a detective, or other intelligent witness, who had carefully compared the prisoner's boot or foot with the track.

A DIES NON.

Why the 29th of February should be blotted out from the book of days juridical it would be hard to guess. Coming only once in four years it might seem to be worthy of special honor. It might be conjectured that at some remote time it was regarded on that very account as a high festival, and therefore not to be counted as a business day. Cowell's Law Dictionary, however, states that it was to prevent ambiguity. Leap-year was called bissextile, "because the sixth day before the Calends of March is twice reckoned, viz., on the 24th and 25th of February: so that the bissextile year hath one day more than other years, and happens every fourth year: . . . and to prevent all ambiguity that might grow therefrom, it is ordained by the statute *De Anno Bissextili*, 21 H. 3, that the day increasing in the leap-year, and the day next before, shall be accounted but one day." The Supreme Court of Indiana, in the case of *Helphinstine v. The Vincennes National Bank*, had the point before it recently, and the ancient statute just referred to was quoted to support the rule followed by the Court. The action was to set aside a judgment in favor of the defendant, on the ground of insufficient service of summons. The service, it was admitted, would be good, if the 29th February, 1876, which intervened between the service and the return day, was to be counted as an ordinary day. The common law of England and statutes passed prior to 4th James I. being in force in Indiana, the judge held that the statute 21 Henry III. was in force in the State. By this statute, he remarked, it was provided, in refer-

ence to the 29th February, in leap-year, "*Et computatur dies ille, et dies proxime precedens, pro unico die*"—that day and the next preceding shall be counted as one day. This rule has been repeatedly laid down in the Courts of Indiana, and the Supreme Court, adhering to the previous decisions, declared the service insufficient.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 12, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

McKINNON, appellant, and THOMPSON, respondent.

Insolvency—Appeal—Security for Costs—Assignee.

The appellant, defendant in the court below, appealing from a judgment against him, in favor of the respondent, who had become insolvent, moved that all proceedings on the part of respondent be suspended until he should have given security for costs, or until his assignee should have taken up the *instance*; and in default of this, that he (appellant) be permitted to proceed *ex parte*. Held, that the appellant was not entitled, under sec. 39 of the Insolvent Act of 1875, to demand security from an insolvent respondent, or to call upon the assignee to take up the *instance*, and in any case such motion could not be entertained without notice thereof to the assignee.

McKinnon, the appellant, who had been condemned in the court below to pay the respondent the sum of \$400, appealed from the judgment. The plaintiff had become insolvent, and the appellant moved in the first place, that, inasmuch as the respondent was insolvent and an assignee had been appointed to his estate, the respondent be declared incapable of proceeding, and that, he, appellant, be permitted to proceed *ex parte*. This motion was rejected. He now moved that all proceedings on the part of respondent be suspended until he should have given security for costs, or until the assignee should have taken up the *instance*, and that in the event of security not being given, or the *instance* not being taken up, he be permitted to proceed *ex parte*.

The appellant relied on sec. 39 of the Insolvent Act of 1875.

DORION, C. J., said the section referred to enacted that an insolvent should not be allowed to sue out a writ, or commence or continue any proceeding, until he had given security. This was to prevent an insolvent from occasioning the other side useless costs. But the law nowhere said that if the opposite party is proceeding, he can call upon the insolvent to give security or the assignee to take up the *instance*. An assignee was not bound to take up the *instance* unless he considered it in the interest of the estate that he should do so. There was another fatal objection to the motion: the assignee had not received notice, and without notice he certainly could not be deprived of his right to intervene.

Motion rejected.

Wotherspoon, for appellant.

Butler, for respondent.

MONTREAL, Sept. 18, 1878.

RASCONY, (defendant in the court below) appellant; and THE UNION NAVIGATION COMPANY, (plaintiffs below) respondents.

Company, Subscription of Shares before formation of

• A subscription of shares in a company to be formed is not binding.

The company sued the defendant, Rascony, for \$500, calls due on stock subscribed by him. Rascony pleaded that he never subscribed for stock in the present company, but in an antecedent one which was being organized. The court below sustained the action.

TESSIER, J., said the question was whether the defendant was really a shareholder. In the case of the same company and Macdougall, Macdougall bought shares on which there were calls paid, and after the letters patent had been obtained. But in the case of Couillard, 21 L.C.J. p. 71, the court exonerated Couillard because he had in no way bound himself after the company was incorporated. He merely subscribed to a company to be formed. The court would follow the same principle as that laid down in Couillard's case, and under this Rascony must be exempted from liability. Consequently the judgment of the court below must be reversed and the action dismissed with costs.

Doherty, Doherty, Robidoux, Potholme & White, for appellant.
Jell, Boique & Choquet, for respondent.

COOLEY, (plaintiff in the Court below), appellant, and THE DOMINION BUILDING SOCIETY, (defendant below), respondent.

Building Society—Note given as collateral security.

Held, that a note given by a building society as collateral security for an advance to the society, is not an ordinary negotiable note, and if lost the holder is not compelled to give security before he can exact repayment of the advance.

The appellant, as sole executor and universal legatee, represented the late John Buxton, who had advanced to the Building Society \$1,000, payable at the expiration of a year, with interest at 8 per cent. The Society admitted the indebtedness, but alleged that they had delivered to Buxton, as collateral security, a note for the \$1,000, and that by the conditions they were entitled to get this note back before the amount was repaid. It appeared that the note could not be found among the papers of the deceased. The plaintiff offered to deposit Merchants' Bank stock to the nominal value of \$1,500 in the hands of a third party, as security that the Society would not be troubled by reason of the note, but this offer was declined, and the Court below being of opinion that the security offered was insufficient, dismissed the action.

DORION, C. J., after stating the circumstances under which the action was brought, said the note here was not an ordinary negotiable note. By itself it was nothing. It was given as collateral security, and was nothing when the debt was acquitted. The appellant, therefore, could not be required to give security, but simply to give up the deposit book.

Judgment reversed.

Archibald & McCormick, for appellant.

Abbott & Co., for respondent.

Montreal, September 21, 1878.

BRAULT, Appellant, and BRAULT, Respondent.

Donation—Judicial Counsel.

Held, where a person had expressed an intention to make a particular donation, and subsequently, while afflicted with softening of the brain and of feeble intelligence, he made the donation with the assistance of a judicial counsel, that the donation was valid.

MONK, J., dissenting, observed that the appeal was from a judgment dismissing an action to

set aside a donation from one brother to another, and excluding his brothers and sisters. The grounds on which the action rested were, first, that the deceased was in an unsound state of mind, secondly, that the donation had been obtained by manoeuvres and undue influence. The Court below, although it was proved that the donor was suffering from the peculiar disease called softening of the brain, maintained the donation. His Honor thought it was proved beyond all doubt that for three or four years preceding the donation this man was in a state of imbecility, and was incapable of making a valid disposition. The matter was fully examined in the case of Flanigan and Sir George Simpson, which, however, differed from the present. Here the donor was in such a state of imbecility that he could not conduct his business, and his relations thought to improve the condition of things by giving him a judicial counsel. This was a mitigated form of interdiction, and the proof that the act was done in a lucid interval was on the other party. His Honor thought this appointment of a judicial counsel was for the express purpose of doing what they thought there was no chance of effecting otherwise, and of making the donation all right. The man was in a hopeless state of imbecility, and died of the disease. Under the circumstances, his Honor thought the donation should be set aside.

DORION, C. J., said that when the proof was contradictory, as to whether a person had intelligence enough to do an act, the Court must see whether the act was reasonable in itself, and if so, the Court might say that the man had sufficient intelligence to do it. In a case previously adjudged to-day, (*Chapleau v. Chapleau*, ante p. 473,) the testator was in *delirium tremens*, and the pretended will had been made only three days before his death. Here the circumstances were different. The donor was afflicted by a disease which did not render him mad or violent, or incapable of doing things. The act was the act of a man of feeble intelligence, but he had long before expressed the intention of doing this very thing, and was but carrying out a resolution formed years before. The donation would therefore be maintained.

M. E. Charpentier, for appellant.

C. Gill, for respondent.

SUPERIOR COURT.

[In Chambers.]

Montreal, September 30, 1878.

RAINVILLE, J.

IN re MONTREAL CENTRE ELECTION.

Election—Count—Ballots Opened by Returning Officer.

Held, where the returning officer opened the envelopes containing the ballots as transmitted by the deputy returning officers, that the Judge could not re-count the ballots under section 55 of the Dominion Election Act.

An election having been held for Montreal Centre, and an application having been made under section 55 of the Election Act for a count of the ballots by a Judge, it appeared that the returning officer had removed the ballots from the envelopes in which they had been transmitted to him by the deputy returning officers, and had made them into two packages.

RAINVILLE, J., said the law was very clear and precise, that the ballots as transmitted by the deputy returning officers should remain in the same state until opened by the judge, on a demand being made for a count. The returning officer in the present case had, therefore, exceeded his duty in opening the envelopes. Under the circumstances, his Honor said he could do nothing, and he would declare the impossibility of taking any action, and leave the returning officer to adopt such course as he might be advised. Each party to pay his own costs on this application.

Devlin, and *Archambault*, Q.C., for petitioner.
Lacoste, Q.C., and *Curran*, Q.C., for respondent.

**THE LAW IN REGARD TO VESSELS
PROCEEDING TO SEA, AND THE
COMPULSORY EMPLOYMENT
OF PILOTS.**

There have recently been several note-worthy cases decided in regard to points connected directly with compulsory pilotage, which indirectly touch upon and make clearer the general law in regard to the employment of pilots, and especially as to their employment in vessels proceeding to or from sea. The most recent of these cases—which are of no little importance in maritime law—is *The Princeton*, 38 L. T.

Rep. N. S., 261, which gives yet a larger authority to the principles enunciated in the cases lately but previously decided. The first, and perhaps the most important point which has been raised, and more or less set at rest by these recent decisions, is the meaning of the term "proceeding to sea," or of the reverse one, "proceeding into port" or "into dock." It is true that these questions have been raised primarily on certain statutes, but as a matter of fact they have, in regard to this point, turned upon the meaning which is to be attached to these words. Nor is it indeed necessary to regard them as confined merely to such sentences as we have set out above; had they been so limited they would have had no more general importance than any case decided upon the construction of a particular statute. But they have a wider bearing than this, for, assuming that pilotage is compulsory on a vessel going out to sea, they have made it clear what time and what events are to be included in this process, and they must consequently have a bearing upon cases which may involve other points than those touching simply on compulsory pilotage. No actual principle in so many words has been laid down in regard to this matter; but, comparing the various decisions, we should formulate one somewhat in this form: A vessel is proceeding to sea from the moment she leaves the dock till the moment she reaches the open sea, except during such intervals as she is voluntarily stationary for purposes other than those connected with and necessary for the actual transit from dock to sea. And equally, of course, this definition will apply to the opposite movement, that is, from the open sea to the dock. We do not say that this definition might not be improved; but it is what may be termed a good working principle, and embodies in a reasonably concise form the result of the cases which serve as examples of it, and to which some reference must be made.

The first case of importance occurred in the Common Law Courts, and that is of *Rodrigues v. Melhuish*, 10 Ex. 110. The question arose out of an accident in the river Mersey. On the 2nd of December the ship went out of dock, and the pilot went on board on the 3rd; the master was not on board, the riggers were completing the rigging out of the ship, which lay

at anchor with the pilot in charge, and during this period the plaintiff was injured. The point immediately arose on the construction of 5 Geo. 4, c. 73, s. 35, by which pilotage on the Mersey was then regulated, and which, so far as is necessary to the present examination, ran: "That in case the master or commander of any ship or vessel outward bound," etc., "shall proceed to sea," and so on. The question arose whether, under the above circumstances, this ship was proceeding to sea, so as to bring her within the above clause as regards the compulsory employment of a pilot, so that the liability of the owners for the injury done to the plaintiff would be taken away. The Court decided that the ship was not proceeding to sea, for the reasons well and concisely put by Chief Baron Pollock. "If this vessel," he said, in delivering judgment, "had all her cargo on board, and she had had everything ready to commence her voyage forthwith, and had left her berth with that intention, it might no doubt have been said that she was proceeding to sea from the time she first left her berth;" but under the circumstances, the Chief Baron could not hold that she was so proceeding. Here, then, it will be observed, was an interval during which the vessel in question was stationary in the river for a purpose other than that connected with her actual transit from dock to sea, namely, to place her in a proper condition to proceed to sea at all. Thus, when she went out of dock she was unfit to go to sea, and consequently the transit could not have commenced—she was in no sense *in itinere* when stationary in the Mersey. Let us now turn to a case which resulted in the reverse way, and which, while it still further supports our proposition, affords an instance of a vessel proceeding to sea. The case is that of *The City of Cambridge*, 30 L. T. Rep. N. S. (Privy Council) 489; L. Rep. 5 P. C. 451; and was decided in 1874. On the night of the 20th Feb. the City of Cambridge left the dock in charge of a licensed pilot, fully equipped and prepared for sea. Having been taken out of dock she anchored in the Mersey ready to cross the bar by the next tide, and this wait between tide and tide for the purpose of crossing the bar was absolutely unavoidable for every ship drawing the water which the City of Cambridge did. During the time that the vessel was thus

stationed in the river she drifted, and then committed the damage which was the subject of the action. The following passage from the judgment of Sir Montague Smith explains the result very clearly: "The question is, whether this vessel was proceeding to sea, so that the employment of a pilot was compulsory before and at the time of the collision. When the ship left the dock the object of the master was to prosecute his voyage by getting to sea as soon as he could. It is true it had been arranged between the pilot and himself that the vessel should anchor in the Mersey for the night, but that was done to further the object of getting out to sea by going so far on the way as would enable her to cross the bar on the next morning's tide, which the vessel could not have done if she had remained in dock, or at least she could not have crossed it so early. Their Lordships think that under the circumstances the ship was proceeding to sea at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it." Here, then, we have a stoppage for a purpose directly connected with the transit from dock to sea, namely, until sufficient water was over the bar. It is true it may be called a voluntary stoppage; but it is only so far voluntary in that it was immediately so, but proximately the cause of it was one over which those in charge of the ship had no control—the state of the tide. Therefore there was not, as in *Rodrigues v. Melhuish*, any voluntary stoppage for a purpose not connected with, and necessary for, the actual transit from dock to sea. A question in the case also arose as to the consequence of certain payments to the pilot; but, for all practical purposes, the extract which we have given from the judgment of the court sets out the cardinal point of the case, the one upon which it really turned, and shows its bearing upon the proposition which we have already laid down.

A somewhat earlier case, *The Woburn Abbey* (20 L. T. Rep. N. S. 621), affords a useful instance of vessels going in the contrary direction, that is, from sea to port; but, as in the case of *Rodrigues v. Melhuish*, there was a stoppage which caused a break in the transit. The ship was moored in the Mersey on the after-

noon of the 27th, and the collision took place on the evening of the 29th. There was no cause shown for so long a delay as this in the transit, no storm occurred, and no evidence was given that the Woburn Abbey could not have gone into dock. Therefore, here was a delay for a purpose other than one connected with the immediate transit from sea to dock. The very latest case of all, that of *The Princeton*, (38 L. T. Rep. N. S. 261), shows circumstances as regards the delay almost similar to those which happened in the case of the Woburn Abbey, and as in that case so in this, the vessel was inward bound. But here the delay occurred from a *vis major*, for the weather was so tempestuous that, after the first mooring, the vessel could not proceed with safety into dock. Consequently the court held that the pilot was not, as in the Woburn Abbey, *functus officio*, and that the delay was due to causes over which those who had charge of the vessel had no control. Therefore, it is obvious, as expressed in the proposition already given, that the Princeton was not voluntarily stationary for a purpose unconnected with and necessary for the actual transit. During the first part of the period during which the ship was moored she was stationary for purposes connected with her entry into dock, during the latter part on account of the stormy state of the weather. It is true that both these cases turned, to some extent, on certain acts of Parliament; but they do not affect the principle—they are connected more with the actual engagement of a pilot. Thus it seems clear that we are now, by an analysis of the facts of the four cases touched upon, enabled to extract a safe principle in regard to vessels proceeding from or to sea—a principle alike sensible and just, and one which a careful examination of the cases which we have cited as examples should make perfectly plain.—*The London Law Times*.

GENERAL NOTES.

PROFESSIONAL ETIQUETTE IN THE UNITED STATES.—We are afraid our excellent contemporary, the *Chicago Legal News*, has, "put its foot in it." The *Solicitors' Journal* having innocently said something about its being difficult for the "popular mind to grasp the idea of the majesty of the law as personified, for instance, in the American

courts, which, according to the description of a recent writer, consists of 'an elderly gentleman sitting on a cane bottom chair and expectorating thoughtfully,' the *Legal News* read "our learned and respected contemporary" a lecture, and informs it among other things that, "There is no country in the world where the judges of inferior courts of record preside with more dignity and indulge less in wrangles with attorneys, and are more respected by the bar and people, than in America." This is all well enough, if it be true, and it ought to be; but we doubt if it will have its due weight on the mind of "our learned and respected contemporary," for in the very next article in the *Legal News*, we are given an account of "professional etiquette on the frontier," wherein is stated the cause of the great unpopularity of Judge Beck, "Judge of Wyoming." We quote:

"He even carried his whim of professional propriety so far as to prohibit swearing in court, and is said to have fined a lawyer who swore at a witness during his cross-examination. Another peculiarity of this judge is a dislike of seeing attorneys, when arguing a case before him, pass around a bottle of whisky, and he is said to be violently opposed to lawyers treating the jury to "drinks" while a trial is in progress. Judge Beck is said to have violated common decency by refusing to proceed with a case until the attorneys engaged in it should put out their pipes; and a community once rose in indignation when he ordered a lawyer to remove his feet from the judge's desk."

This was all, no doubt, very difficult for the "popular mind" to submit to, but when Judge Beck instructed the grand jury "to indict every man who indulged in gambling, or sold liquor without a licence, the outraged public demanded his removal." As is usual under like circumstances in this country, the Legislature was "seen," and the result was that a "redistricting act" was passed, and Judge Beck was assigned to a district without "a town or a court house, and entirely uninhabited, except by military garrisons, Indians and wild beasts." The "popular mind" was thereby satisfied. Of course, Judge Beck was not a "politician"—a "machine politician"—or he never would have so run counter to the "sense of the people"—and this suggests the wonder, how, not being a "politician," he got his appointment—but however that may be, the *Legal News* should have remembered that the degenerate foreigner is not up in these matters, and should have kept its lecture and Judge Beck's case apart. By

the way, we believe that women are voters and "lawyers" in Wyoming.—*Albany Law Journal*.

MISTAKE IN SEARCH.—In *Siewers v. Commonwealth*, 6 Week. Not. Cas. 17, recently decided by the Supreme Court of Pennsylvania, it is held that, while a recording officer who furnishes a search is not liable for a mistake in it, except to the person who employs him, he may by affirming its correctness to another become liable for a mistake therein to such other. In this case a prothonotary made a search for one Anthony who desired to borrow money. Anthony paid for the search and took with it the certificate of the prothonotary to its correctness to one Beck from whom, as agent for one Housman, he expected to borrow the money. Beck not relying on the search went with Anthony to the prothonotary who reaffirmed its correctness, and at Beck's request made a new search of his index, and returned the search to Beck again, affirming its correctness. Beck thereupon lent the money upon the security of a judgment note. It turned out that there was a judgment against Anthony which was omitted from the search. It was held that there was a republication of the original search rendering the prothonotary liable to Housman for the injury resulting to him from the omitted judgment. See, as to the general rule limiting the responsibility of the searching officer to the person for whom the search is made, *Commonwealth v. Harmer*, 6 Phila. 90; *Housman v. Girard Mut. Build. Assoc.*, 31 P. F. Smith, 256; *Hood v. Fahnstock*, 8 Watts, 489; *Brocken v. Miller*, 4 W. & S. 110.

COURTS.—Court, says Cowell, is the house where the king remaineth with his retinue; also, the place where justice is administered. These two meanings were in the beginning closely connected. For, in early English history, when the king was actually the fountain and dispenser of justice, nothing could be more natural than that subjects aggrieved by the conduct of powerful barons, or complaining of each other's shortcomings or misconduct, should use the expression "the court," in speaking of the journey to the place where the king was domiciled, and the application to him preferred, usually, in the court (*curia* or *curtis*) of the palace for interference and redress. Anciently, the "court," for judicial purposes, was the king and

his immediate attendants; later, it meant, in the judicial sense, those to whom he had delegated the authority to determine controversies and dispense justice, but who still sojourned or travelled with him. It was an important stipulation in Magna Charta, that the court (speaking judicially) should no longer migrate with the royal progresses, but should be held at some settled place; which was carried into effect by the organization of *aula regia*, q. v. Now, the word court might well have been changed for some more appropriate substitute. But names are more enduring than things. Court continued in use in the sense of a tribunal of justice; an authority organized to hear and determine controversies in the exercise of judicial power.—*Abbott's Law Dictionary*.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 492.]

Company.—2. The plaintiff brought an action to recover the sum paid for shares in the defendant company, proving that he was induced to take the shares by fraud of the directors. A resolution had been passed for voluntarily winding up the company; and the assets, including the uncalled capital, were insufficient to pay its debts. Held, that the plaintiff had no case.—*Stone v. The City & County Bank, Limited*. *Collins v. Same*, 3 C. P. D. 282.

3. In 1872, one E., having contracted with J., the owner of a colliery, to get up a company to purchase the colliery, for which J. was to have £4,500 cash and £11,000 shares, made an arrangement with S. that S. should get up a company to purchase the colliery for £25,000 cash and £25,000 shares, the balance to be divided equally between E. and S. S. started the company, and got the six directors to act, and undertook that they should be at no expense. J. and E. contracted to sell the property to a trustee for the company on the terms agreed by E. and S. A clause in the company's articles stated that the directors were "authorized and empowered" to repay themselves out of the capital all the "expenses whatsoever incurred in the formation of the company." The qualification of a director was fifty shares paid-up stock. By an agreement between S. and the directors, S. received £3,500 "for pre-

liminary expenses." The directors received no vouchers for these expenses, and they knew nothing about the arrangement between S. and E., under which S. actually received £3,200. Out of the £3,500 S. paid the calls on the shares held by the directors. On the winding up of the company, *held*, that the payment of the £3,500 was, under the circumstances, a "misapplication" of the funds of the company under the Companies Act, 1862, c. 165, and the directors must repay it to the company.—*In re Englefield Colliery Co.*, 8 Ch. D. 388.

4. A company allotted A., proprietor of a newspaper, seventy-five "fully paid-up" shares, in consideration that the newspaper would advertise the company's prospectus for three months. The allotment was made April 7, and the first advertisement was inserted April 8. No contract was registered as required by the Companies Act, 1867. *Held*, that the shares were not paid for in cash, and the holder must be placed on the list of contributories as a holder of shares not paid for. *Spargo's Case* (L. R. 8 Ch. 412) distinguished.—*In re Church & Empire Fire Insurance Fund. Andrew's Case*, 8 Ch. D. 126.

Compounding Felony.—See *Surety*.

Compromise.—See *Company*, 1.

Concealment.—See *Surety*.

Condition.—See *Sale*, 3; *Waiver*.

Consideration.—See *Sale*, 4; *Settlement*, 1.

Construction.—See *Annuity*, 1; *Bequest*; *Contract*, 1; *Landlord and Tenant*, 1; *Railway*, 2; *Taxes*; *Will*, 1, 2, 3, 4.

Contract.—1. Contract in writing, by plaintiffs to cut and lengthen and repair defendants' ship, "to enable the vessel to be classed 100 A 1" at Lloyd's, for £17,260 and the old material. Reference was made for details to specifications annexed to and forming part of the contract. These specifications consisted of two items, headed respectively "lengthening" and "iron work." Under the first were particulars stating, among other things, that all the "iron and wood work" of certain portions of the vessel named was to be "new and complete," and every way "in accordance with Lloyd's rules to class the vessel A 100." The other item read as follows: "The plating of the hull to be carefully overhauled and repaired [but if any new plating is required, the same to be paid for extra]. Deck beams, ties, diagonal ties,

main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification." The words standing above in brackets were erased, but left legible, and were signed by certain initials. *Held*, in an action for extra pay for new plating, that, if new plating was required to render the ship 100 A 1 at Lloyd's, the plaintiffs were obliged, according to the contract, to furnish it without extra pay, and that the erased words could not be used as proof of the intention of the parties.—*Inglis v. Buttery*, 3 App. Cas. 552.

2. Action for specific performance of an agreement by defendant to take at par 2,000 shares in the plaintiff company, at such times as should "be required for the purposes of the company." At the time of the above agreement, the directors of the company agreed to pay the defendant, "in consideration of his services," £4,000, by draft payable in twelve months from date, and to be dated on the day when he should pay for the said 2,000 shares in full. The directors had no authority to issue shares below par. The defendant set up in defence that he had rendered no services to the company, and that the object of the two agreements was to issue shares to him at a discount; that the two agreements formed in fact only one contract, and the two parts were made separate, in order to enable the directors to evade said limit in their powers, and he asked to have his name removed from the list of subscribers. *Held*, that he must take and pay for the shares in full. He could not set up the fraud of the directors, in which he had colluded, in order to invalidate the contract, and the contract was divisible. He was left to another action to recover his £4,000, if he could.—*Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235.

3. The plaintiff wrote the defendant's agent for the sale of a leasehold as follows: "In reference to Mr. J.'s premises.... I think £800.... about the price I should be willing to give. Possession to be given me within fourteen days from date.... This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction, which I am informed can be done." A few days afterwards the agent wrote: "We are instructed to accept your offer of £800 for these premises, and have asked Mr. J.'s solicitor to prepare contract." The lease was modified as required by plaintiff's solicitor.

Held, that the two letters formed a complete contract.—*Bonnewell v. Jenkins*, 8 Ch. D. 70.

Contribution.—See *Salvage*, 2.

Contributory.—See *Company*, 1, 4.

Conversion.—See *Insurance*; *Settlement*, 2; *Will*, 1, 5.

Copyright.—Defendant adapted a play from a French novel and drama, in which it was found as a fact that he had introduced two unimportant "scenes or points" or "scenic representations" already used by plaintiff in an adaptation previously made by him, but which had no counterpart in the French original. *Held*, that, under the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15, § 2, the defendant was not liable, inasmuch as the portions taken were not material and substantial.—*Chatterton v. Cave*, 3 App. Cas. 483; s. c. L. R. 10 C. P. 572; 2 C. P. D. 42.

Corporation.—By act of Parliament, it was provided that every contract above £50, made by a public corporation like the defendant, should "be in writing, and sealed with the common seal" of the corporation. The jury found that the defendant corporation verbally authorized its agent to order plans for offices of the plaintiff; that the plans were made, submitted, and approved; that the offices were necessary, and the plans essential to their erection; but the offices were not built. *Held*, that the plaintiff could not recover. Distinction between trading and public corporations.—*Hunt v. The Wimbledon Local Board*, 3 C. P. D. 208.

Costs.—Where a defendant admitted his liability for the debt sued on, and set up a counter claim exceeding the plaintiff's in amount, the defendant was refused security for costs against the plaintiff, as being a foreigner, residing out of the jurisdiction.—*Winterfield v. Bradnum*, 3 Q. B. D. 324.

Covenant.—See *Landlord and Tenant*, 1, 3; *Partnership*, 1.

Damages.—In an action for damages, injury to plaintiff's buildings by the withdrawal of lateral support through mining operations carried on by the defendant on the adjacent land, a referee found £400 damages already accrued, and £150 prospective damages. *Held* (Cockburn, C. J., dissenting), that prospective damages could be recovered. *Backhouse v. Bonomi* (9 H. L. C. 503) and *Nicklin v. Williams*

(10 Ex. 259) discussed.—*Lamb v. Walker*, 3 Q. B. D. 389.

Deed.—See *Mortgage*, 2.

Delivery.—See *Railway*, 3; *Sale*, 2.

Demurrer.—Claim that the defendants, by placing refuse and earth on their land, caused the rain-water to percolate through and flow upon the plaintiff's adjoining land and into his house, as it would not naturally do, and that substantial damage was caused thereby. *Held*, not demurrable.—*Hurdman v. The North-Eastern Railway Co.*, 3 C. P. D. 168.

Devise.—See *Trust*, 1; *Will*, 1.

Director.—See *Company*, 3.

Discount.—See *Bank*, 2.

Discovery.—See *Attorney and Client*, 1, 2.

Discretion of Trustees.—See *Trust*, 2.

Distribution.—See *Annuity*, 2.

Divisible Contract.—See *Contract*, 2.

Documents, Inspection of.—See *Attorney and Client*, 2.

Evidence.—See *Contract*, 1; *Slander*; *Will*, 1.

Execution.—Sect. 87 of the Bankruptcy Act, 1869, provides that "where the goods of any trader have been taken in execution for a sum exceeding £50" within a specified time before bankruptcy, proceedings on it shall be restrained. Appellants got judgment for £54, but indorsed the writ for £43 only. *Held*, that the execution was good for that sum, notwithstanding the judgment for more than £50.—*In re Hinks. Ex parte Berthier*, 7 Ch. D. 882.

Fraud.—See *Company*, 2; *Contract*, 2; *Sale*, 1, 4.

Frauds, Statute of.—See *Sale*, 3.

General Average.—See *Shipping and Admiralty*.

Husband and Wife.—1. A wife's property was, on her marriage, settled to her separate use, without power of anticipation. A judgment was obtained in the Queen's Bench against her for debts contracted previous to her marriage; and, in an action in the Chancery Division, to enforce this judgment against her separate estate, *held*, that the judgment debt and costs should be recovered against her separate estate, in spite of the restraint against anticipation in the settlement, under the Married Women's Property Act, 1870, which provides that "the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such

debts [contracted before marriage] as if she had continued unmarried."—*London & Provincial Bank v. Bogle*, 7 Ch. D. 773.

2. When a wife sues for separate estate, the husband should be made a defendant, not a plaintiff. The Judicature Act has not changed the practice.—*Roberts v. Evans*, 7 Ch. 830.

3. Under the Married Women's Property Act, 1870, the husband must still be joined as defendant when an action is brought against the wife to charge her earnings in a pursuit carried on by her apart from her husband.—*Hancocks v. Demeric-Lablache*, 3 C. P. D. 197.

See *Married Women*.

Infant.—By the marriage settlement, made under the direction of the court, of a young lady then "an infant of seventeen years and upwards," certain property of hers was vested in trustees, among other things to reinvest the same, "with the consent of" the said infant and her husband, and after the death of either with the consent of the survivor, and after the death of the survivor, at the discretion of the trustees. The wife had the first life-interest. *Held*, that the wife, though an infant, could give her "consent" to a reinvestment, as contemplated by the settlement. She could exercise a power, though coupled with an interest.—*In re Cardross's Settlement*, 7 Ch. D. 728.

Injunction.—See *Partnership*, 2; *Trade-mark*; *Way*.

Insurance.—By the terms of a lease, dated September 29, 1870, the lessee had the option to purchase the premises at an agreed price, by giving notice before Sept. 29, 1876, of his intention to do so. The lessor covenanted to insure, and did insure. May 6, 1876, the buildings were burnt down, and the lessor received the insurance money. Sept. 28, 1876, the lessee gave notice of his intention to purchase, and claimed the insurance money as part payment. The lease contained nothing as to the disposition of the insurance money. *Held*, that the lessee was not entitled to it. *Laues v. Bennett Cox* 167) criticised; *Raynard v. Arnold* (L. R. 10 Ch. 386) explained.—*Edwards v. West*, 7 Ch. D. 858.

Interest.—See *Waiver*.

Joint Tenant.—See *Trust*, 1.

Judgment.—The plaintiff sued defendants, to recover a penalty for violation of the Sunday statute, 21 Geo. 3, c. 49. The action

was brought Aug. 17, 1877, in respect of a violation of Sunday, August 15. October 29, one R. brought suit against the defendants to recover for all the Sundays from and including August 15, to the date of the writ. Judgment in this suit went by default, and was pleaded in bar by defendants when plaintiff's suit came up. It appeared that defendants' attorney got R. to allow the use of his name to bring the suit, in order to cut off suits by others for the penalty, and in order to gain time to apply to the Home Secretary for a remission of the penalties; that R. never intended to enforce the judgment, or to have any thing further to do with the matter, but that he did not know of the suit brought by the plaintiff. *Held*, that R.'s judgment was obtained by covin and collusion, and could not be pleaded in bar of plaintiff's suit; and, moreover, the claim of plaintiff for the penalty became a debt from the date of his writ, and was not affected by subsequent suits.—*Girdlestone v. The Brighton Aquarium Co.*, 3 Ex. D. 137.

Jurisdiction.—See *Arbitration*.

Laches.—See *Principal and Agent*.

Landlord and Tenant.—1. In a lease of a large new warehouse, the lessor covenanted that he would "keep the roof, spouts, and main walls and main timbers of the said warehouse in good repair and condition." There was also a provision, that, "in case the said warehouse..... shall..... be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," there should be a reduction or discontinuance of rent until the building should be again tenantable. While the warehouse was being used by the tenant in a reasonable manner for the purpose which it was let for, the upper-floor beams broke, and two of the outer walls cracked and bulged, so that extensive repairs were made by the lessor, during the progress of which the tenant could not occupy the building. The lessor brought an action against the lessee for the amount expended in repairs, and the latter made a counter-claim for the rent paid by him under protest in respect of the time consumed in making the repairs. *Held*, that the covenant to "keep in good repair" meant such a condition as such buildings must be in, in order to answer the purpose for which they are used. If this particular building was in poor repair when leased, it was not

enough to keep it merely in that condition. The lessee could not claim a rebate of rent under the clause "or other inevitable accident," nor any damages for occupation during the repairs, as the covenant to repair implied leave to enter for that purpose. — *Saner v. Bilton*, 7 Ch. D. 815.

2. A tenant is bound to keep the boundary between his landlord's land and his own distinct and well defined during the continuance of the lease, as well as to render it so at the end of the lease. — *Spike v. Harding*, 7 Ch. D. 874.

3. Lease by defendant to plaintiff of a basement, "together with the full and undisturbed right and liberty to store cartridges therein." The lessor covenanted to keep the premises and the landing-pier adjoining in proper repair and condition "for storing, landing, or shipping away cartridges;" and there was a covenant for quiet enjoyment. Before the lease ran out, the Explosives Act, 1875, rendered it no longer lawful to keep cartridges in the premises. Defendants gave plaintiff notice to remove the cartridges; and plaintiff refusing, defendant removed them himself. Plaintiff brought an action on the lease to restrain defendant from obstructing the storing of the cartridges, and to require him to render it possible for cartridges to be lawfully stored on the premises, and for damages. *Held*, reversing the decision of FRY, J., that judgment must be for the defendant. — *Newly v. Sharpe*, 8 Ch. D. 39.

Lease.—See *Insurance; Landlord and Tenant; Negligence*, 2; *Partnership*, 2; *Way*.

Legacy.—See *Will*, 5.

Libel.—See *Slander*.

Luggage.—See *Railway*, 1, 3.

Market Overt.—See *Sale*, 1.

Marriage Settlement.—See *Infant; Settlement*.

Married Women.—1. A testatrix bequeathed to her "niece M. J., the wife of R. H.," a share in a fund resulting from real and personal estate, after the termination of a life interest in the same. The testatrix further declared that every provision made for any woman in the will was made and intended to be for her sole and separate use, without power of anticipation, and that her receipt alone should be a sufficient discharge for the same. The tenant for life died before the testatrix, and the fund had been ascertained and paid into court. *Held*, that it should be paid out to her on her separate

receipt. — *In re Ellis's Trusts*, (L. R. 17 Eq. 409) commented upon. — *In re Croughton's Trusts*, 8 Ch. D. 460.

2. T. was married in 1846, and became insolvent in 1861, and had no assets. In 1876, his wife became entitled under her father's will to £500 a year for life, remainder to her children. The will did not settle the income to her separate use, and there was no marriage settlement. The husband contributed nothing to the wife's support. The general assignee claimed half the income for the creditors. *Held*, that the court could settle it all on the wife, in its discretion; and such settlement was made. — *Taunton v. Morris*, 8 Ch. D. 453.

Misapplication of Funds.—See *Company*, 3.

Mortgage.—1. A mortgagor was obliged to take out letters of administration, in order to perfect the title of the mortgaged premises to the mortgagee. In an action for foreclosure and payment of the sum due on the mortgage, *held*, that the mortgagor was not entitled to have the costs of taking out the letters paid out of the mortgaged property. — *Saunders v. Dunman*, 7 Ch. D. 825.

2. *Held*, that a person mentioned in a deed with two others, as a party to it, but who never executed it, could not maintain an action to have the deed declared void. *Held*, also, that one of three co-mortgagees could not maintain an action to foreclose, making the mortgagor and his two co-mortgagees defendants. — *Luke v. South Kensington Hotel Co.*, 7 Ch. D. 789.

Negligence.—1. The defendant used his premises for athletic sports. A private passage, having a carriage-track and footpath, ran by his place, the soil of which passage belonged to other parties, but over which there was a right of way. In order to prevent people in carriages from driving up the road to his place to see the sports over the fence, the defendant, without legal right, and, as found by the jury, in a manner dangerous to persons using the road, barricaded the carriage-road by means of two hurdles, one placed on each side of the road, leaving a space in the centre, which was ordinarily left open for carriages, but on occasion of the games was closed by a bar. Some person unknown moved one of the hurdles from the carriage-road to the footpath alongside. The plaintiff, passing over the road on a dark night in a lawful manner, and without negli-

gence, came in contact with the obstruction on the footpath, and had an eye put out thereby. *Held*, that the defendant was liable for the injury.—*Clark v. Chambers*, 3 Q. B. D. 327.

2. The plaintiff and the defendant company were tenants of adjoining land under the same lessor, and the company's lease required it to maintain a fence around its land, for the benefit of the lessor and his other tenants. Twenty years ago, the predecessors of the company in title built a wire fence about the land, and the company repaired it from time to time; but in lapse of time the wires rusted, and pieces fell off into the grass on the plaintiff's land, and plaintiff's cow grazing there swallowed a piece from the effects of which she died. *Held*, that the company was liable for the value of the cow.—*Firth v. The Bowling Iron Company*, 3 C. P. D. 254.

Notice.—See *Bank*, 2.

Officer.—See *Quo Warranto*.

Onus Probandi.—See *Slander*.

Option to Purchase.—See *Insurance*.

Original Gift.—See *Will*, 3.

Outsensible Partner.—See *Partnership*.

Particular Average.—See *Shipping and Admiralty*.

Partnership.—1. By partnership articles between the plaintiff and the defendant, the defendant covenanted not to "engage in any trade or business except upon the account and for the benefit of the partnership." After the partnership had been dissolved, the plaintiff learned that the defendant had been, during the partnership, a partner in another business, and had realized profits from it; and he thereupon filed two bills, one for an account of defendant's profits in the other business, and another for a declaration that defendant's interest in the other business was assets of the partnership with himself. The first bill was dismissed without costs. If the plaintiff had any case, it was a case for damages. The second bill was dismissed with costs.—*Dean v. McDowell. Same v. Same*, 8 Ch. D. 345.

2. In 1861, partnership articles were entered into between the plaintiff and the defendant to carry on the business of ironmongers, for twenty-one years, at the R. premises, "or in such other place or places as the said parties hereto may agree upon." In 1863, the partners agreed that thenceforth the business should include that of iron-founders; and they

purchased foundry works at Q., where the foundry business was carried on until 1876, when the lease of the Q. premises ran out. The plaintiff declined to renew the lease, and wished to give up the foundry business. The defendant thought otherwise, and finally took a lease of the Q. premises in his own name, but, as he said, for the firm, and proposed to continue the foundry business there. Plaintiff moved for an injunction and for a dissolution of the partnership and for a receiver. *Held*, that the defendant had no authority to renew the lease, and the plaintiff was entitled to an injunction against carrying on the foundry business in the name and with the assets of the firm. Receiver refused.—*Clements v. Norris*, 8 Ch. D. 129.

3. In 1875, the firm of H., C., & P. was dissolved, and notice was given by them that the business would be carried on by P. alone. P. undertook to pay H. a balance due him from the old firm. From that time, the business was carried on under the name of P., Son & Co. The bank account was in that name; and the son drew and accepted bills, negotiated loans, and sometimes ordered goods, in the name of the firm, and performed all these acts with authority. He never sold goods. On the outside of the premises the name P. alone appeared. In 1877, the firm failed, and the creditors prepared a petition in bankruptcy against P., trading as P., Son & Co.; but it was finally decided to file the petition against P. and the son, as joint traders, and a resolution for liquidation by arrangement was registered. P. had no separate estate apart from his interest in the business; and H., being the only separate creditor, appealed from the order to register, and the registration was cancelled. A firm creditor then filed a petition in bankruptcy against P. and the son, as a firm, and they were adjudged bankrupt, with their consent. An application by H. to annul the adjudication was refused, and no appeal taken. H. then applied for a declaration that the assets of the business be declared separate estate of P. Both P. and the son testified that the son was not a partner, though he took the position of partner, and that it was the intention to make him one if the business turned out profitable; as, however, was not the case. The petitioning creditor and eight other creditors (there being eighty-two in all) testified that they always considered P. & Son as partners, and the petitioning creditor said the debtors had told him they were partners. P. told a creditor on one occasion that his son had married a lady of means, and on that ground asked for further credit, which was given him. *Held*, that there was a partnership, and the assets must be treated as joint estate.—*Ex parte Hayman. In re Puleford*, 8 Ch. D. 11.

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USELESS PROLIXITY.

It is a little singular that the needless and troublesome verbosity, which so long characterized English forms, still clings to the conveyancing of so progressive a state as New York. A New York conveyancer, in a letter to a contemporary, points out the magnitude of the evil. "On all transfers of real estate," he says, "a serious charge is incurred for the recording of the ponderous, verbose and tautological formulas which are used in our deeds and mortgages, and which have nothing to justify them but their antiquity. It is not too much to say that if any one of our competent lawyers were himself buying or lending money on real estate, he would have no hesitation in adopting a form of conveyance compressed in its language to one-tenth the length of the forms now in general use." The same writer adds: "It is believed that nowhere outside of the city of New York is to be found this ridiculous adherence to the antiquated forms of conveyance which prevailed in Great Britain before the era of legal reform in that country. Everywhere but in this city and vicinity, conveyances are simple in form, and fully protect the rights of parties under them. 'A warranty deed with full covenants,' so dear to the New York lawyer, contains a wilderness of words which is unknown elsewhere. The unseemly length of these conveyances calls for immediate reform, and the Bar Association of New York could not engage in a better or more useful work than in giving full ventilation to the subject. The good sense of the legal reformers in England, nearly a half century ago, found a simple way of ridding themselves of this same evil; they boldly cut the Gordian knot, and framed a deed and mortgage, which it was declared should have the same effect as if they had contained all the old cumbrous phraseology then in use. A similar course pursued here in the enactment of a proper statute by the Legislature would leave the old lawyer without an excuse, compel him to give up the cherished idols of the

past, his persistent worship of which has been at so large a cost. A reform like this would greatly reduce the fees in the offices of the County Clerk and Register, and render them less attractive to the politician."

In the Province of Quebec, the cadastral system has done something to shorten deeds of conveyance and mortgage; but we cannot truthfully pretend that our forms are as simple as they might be. A great deal of useless verbiage still clings to them, and not only adds unnecessarily to the expense, but retards the registration of the documents.

SOCIAL SCIENCE ASSOCIATION.

The 22nd annual congress of the British Social Science Association was appointed to be held at Cheltenham, from Oct. 23 to Oct. 30, under the presidency of the Right Hon. Lord Norton, K. C. M. G. In the department of "Jurisprudence and amendment to the law," the following special questions were to be considered:—"1. The codification of the criminal law, with special reference to the Attorney-General's Bill; 2. Simplification of the evidence of title to real property by record of title or otherwise; 3. Whether the extinction of all customary and other special tenures and the limitation of the leasehold terms are not desirable; 4. Should the summary jurisdiction of magistrates be further extended? 5. The consideration of the proceedings of the Stockholm International Prison Congress."

AIDS TO THE VOICE.

Mr. Gladstone is noted for the attention which he pays to his voluminous correspondence, and for the freedom with which, in his replies, he expresses opinions on a great multiplicity of subjects. One of his latest epistolary efforts refers to the management of the voice in public speaking. The remarks of the ex-Premier on this subject are of a practical turn and may be of service to some of our younger readers. In acknowledging the receipt of Dr. Shuldham's recent treatise on "clergyman's sore throat," Mr. Gladstone says:—"No part of your work surprised me more than your account of the various expedients resorted to by eminent singers. There, if anywhere, we might have anti-

cipated something like fixed tradition. But it seems we have learned nothing from experience, and I can myself testify that even in this matter fashion prevails. Within my recollection an orange, or more than one, was alone, as a rule, resorted to by members of Parliament requiring aid. Now it is never used. When I have had very lengthened statements to make, I have used what is called egg-flip—a glass of sherry beaten up with an egg. I think it excellent, but I have much more faith in the egg than in the alcohol. I never think of employing it unless on the rare occasions when I have expected to go much beyond an hour. One strong reason for using something of the kind is the great exhaustion consequent on protracted expectation and attention before speaking."

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

THE LONDON AND LANCASHIRE LIFE ASSURANCE Co., (defendants in the Court below), appellants; and LAPIERRE, (plaintiff below), respondent.

Insurance—Sum insured in Excess of Insurable Interest—Recovery of Premiums.

A creditor obtained an insurance on the life of his debtor, for an amount greatly in excess of his real interest. Both the creditor and the agent of the insurance company were ignorant that such extra insurance was invalid. *Held*, that the insured was entitled to recover the excess of premium paid on the larger sum, and that in the absence of proof to the contrary, the Court would assume that the premium for the smaller sum was proportional to that paid for the larger sum.

The Respondent Lapierre, being a creditor of one Cadotte, applied for an insurance on his life. Lapierre's interest was only \$700, but he was induced by the Company's agent to insure for \$10,000. After paying some premiums at this rate, he learned that he could not recover more than his real interest, and thereupon he claimed the excess of premium which he had paid over and above the premium for an insurance of \$700. The company declining to repay

the premium, the present action was instituted. The Superior Court, Torrance, J., considered that the plaintiff would have been entitled to a return of the excess of premium, if he had proved the precise amount of such excess; but dismissed the action, "seeing that plaintiff hath made no proof of the premiums which the defendants would be entitled to for an insurance on the life of his debtor for \$700, the amount of his debt, and seeing that the court hath not before it any evidence of the precise amount unduly and erroneously paid by plaintiff to defendants."

In Review, this judgment was reversed, Mackay, J., dissenting. The Court held that the company having charged \$781.92 premium on \$10,000, it was a mere question of calculation what the premium should be on the real interest \$700, and that the plaintiff was entitled to recover the difference.

From this decision the company appealed.

The Court of Appeal confirmed the judgment, holding that the insurance for \$10,000 was the result of ignorance of the law on the part both of the insured and the company's agent, and that if the premium on the \$700 was not a proportionate part of the premium on \$10,000, it was incumbent on the company to have established it by evidence.

Judgment confirmed.

J. C. Hatton, for appellant.

Archambault & David, for respondent.

THE TRUSTEES OF THE MONTREAL TURNPIKE ROAD (defendants in the Court below), appellants; and DAoust (plaintiff in the Court below), respondent.

Turnpike Road—Damages—Liability of Trustees.

The plaintiff sustained damage through the bad state of a temporary road used during the obstruction of the turnpike road by works over which the trustees of the road had no control. *Held*, that the trustees having collected toll from the plaintiff were directly liable to him.

The plaintiff, a carter, complained that while passing along the Lower Lachine road in October, 1876, with a vehicle drawn by a valuable mare, the road in one place was in such bad order that the carriage sank on one side up to the axle tree, and the horse was seriously injured by falling on a rock. He claimed \$111 damages, and the court below, finding the plain-

tiff's case substantially proved, allowed him \$60. The Trustees appealed, representing that the accident occurred on a temporary road which had become necessary in consequence of the Lower Lachine road being cut by the Aqueduct, and that the city corporation under whose direction the work was being done should be responsible for this. The majority of the Court of Appeal affirmed the judgment, holding that the trustees having collected toll from the plaintiff for passing along the road, became directly responsible to him for the proper condition of the road. Ramsay and Cross, JJ., dissented.

Judgment confirmed.

John Monk, for appellant.

Wurttele, Q. C., counsel.

Doutre & Co., for respondent.

WHITMAN V. CORPORATION OF THE TOWNSHIP OF STANBRIDGE.—In our note of this decision, p. 474, the ground of the dissent of Mr. Justice Cross was imperfectly stated. His Honor differed on the ground that adjoining proprietors are by law bound to fence front roads, and that the only demand made in the case was for damages caused by not fencing, and for cost of fencing.

NOTES OF CURRENT FOREIGN LAW.

REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE.—Gand. Vol. IX, No. 4; Vol. X, No. 1.

The closing number of the *Revue* for 1877 contains a larger variety than usual of topics interesting to the student of comparative jurisprudence. Three articles are devoted to the law of as many states.

"The new Project of an Italian Penal Code compared with some foreign Laws, and examined from a theoretical Point of View." By A. Rolin, an advocate of Ghent, and secretary of the Institute of International Law.

"Austrian Legislation in 1876." By Dr. A. Geyer, professor in the University of Munich.

"Law Reform in Egypt; a Report to the Minister of Foreign Affairs of Greece." By M. N. Saripoulos, advocate at Athens.

There is also an article by the editor-in-chief, Dr. G. Rolin-Jacquemyns, on the "Relations of the Institute of International Law to the Cen-

tral Committee of the Society of the Red Cross."

The longest article, and no doubt the most valuable, although its subject has less interest just now for American lawyers than for those of Europe, is on "The Law of Booty in general, and especially the Law of maritime Prize," by Professor Bluntschli, of Heidelberg. This is an abridged and free translation from the recent work of the distinguished author, entitled "*Das Beuterecht im Krieg und das Seebeuterecht insbesondere.*" The French version fills (with its conclusion in the following number) seventy-two pages of the *Revue*, and its conclusions are summed up as follows by the author himself, after a rapid survey of the gradual ameliorations which in the course of ages have been wrought out in the laws of war and booty:

"No distinction between war upon land and war upon sea, with regard to their effect upon private property, can be justified on principle. The rule governing all wars alike is that the contest is between States, and not between individuals; that its results affect public rights, and do not strike private rights except through the sovereign power, on which these rights depend; and, consequently, that private property is entitled to the same respect at sea as upon land. Although merchant ships may reinforce the navy, or transport troops, and, therefore, each belligerent has an interest alike in taking them from his enemy and in using them himself, still this does not justify the capture of such ships, but only a temporary seizure, with subsequent restitution and indemnity."

With the tenth volume of the *Revue* a change is made which we hope will commend it more than ever to American lawyers. It will hereafter appear bi-monthly, or six times a year, in numbers of from ninety-six to one hundred and twenty-eight pages. While making international and comparative law its chief object, it seems to be the purpose of the editors to pay more attention than heretofore to general jurisprudence. Professor Arntz, of Brussels, will take editorial charge of whatever pertains to the civil law, especially as now received by the great civil-law peoples of Europe—France, Germany, Italy, etc. Professor Rivier will take charge of the Roman law in its original form, and of the history of the law, including legal biography. Those who have seen the admira-

ble little *précis* of the Roman law, historically treated, which M. Rivier prepared a few years ago for his pupils, will need no other assurance of his eminent fitness for the task assigned him. Mr. Westlake, of Lincoln's Inn, who has from the beginning been one of the editors, will take charge of all that relates to English and Scotch law, and that of the English colonies. It may be presumed that the United States are still counted among the latter so far as their jurisprudence is concerned, for we find no mention of them in this division of topics.

Among the other improvements promised, not the least is a more regular appearance of the numbers of the *Revue*, which have heretofore come out at very uncertain periods, and, usually, long after their date. We are promised all the numbers of Volume X before the end of January, 1879. But at this writing, in September, only the first of them has reached us. Its principal contents, besides the conclusion of Dr. Bluntschli's article, already mentioned, are the following :

"A Chronicle of International Law for 1877 and the first Part of 1878." pp. 5-59. "Rules of International Freight Traffic upon Railroads." By Dr. Bulmering, of Wiesbaden (pp. 83-100), with an additional note by Professor Asser, of Amsterdam. There is also a brief obituary notice of Count Sclopis, and a number of book reviews.

REVUE GÉNÉRALE DU DROIT, DE LA LÉGISLATION, ET DE LA JURISPRUDENCE. Paris. Année III. May-June, July-August, 1878.

The number for May-June opens with an article, by Sir Henry Maine, on "The legal Organization of the Family among the Southern Slaves and the Rajpoutes." The author notices at some length one of the most ancient institutions of the Aryan race—house-community. It still exists in the provinces of Turkey in Europe, and is identical with the Roman *gens*, the Keltic *sept*, the Teutonic *parenté*, and the *joint family* of the Hindoos. The article is translated from the *Nineteenth Century*.

This is followed by a plea for a liberal interpretation of articles in the French Civil Code relating to the legal community of husband and wife. This article, entitled "The Theory of Deductions" (*Préliminaires*), is written by Daniel

de Folleville, professor in the Faculty of Law at Donai.

"Political and administrative Teaching" is a long, and in some respects able, discussion of the best method of securing thorough preparation for the diplomatic and civil service in France. Strong ground is taken against special schools under State control, like the military institutions. The repressive power of the State system and the danger to liberty are urged as sufficient reasons for discarding everything like the German system. The plan, which, with some qualifications, is approved, adds sections of administrative and political science to the regular schools of law. The proposed course would include administrative law, comparative constitutional law, political economy and finance, the law of nations, and diplomatic history. By engrafting these branches upon existing schools, and making a thorough acquaintance with them essential to entrance to the public service, a broad education would be secured, and the danger of a prejudiced and domineering "class" avoided.

The second article in the July-August number is an argument, by Julien Brigault, in favor of international rogatory commissions for the purpose of obtaining testimony in criminal cases, of witnesses residing in foreign countries. This is shown to be in accordance with the spirit of international law, and to be attended with few practical difficulties. Such commissions must, however, rest entirely upon treaty stipulations, and are of comparatively recent origin. So late as 1876 Great Britain refused to incorporate a concession to this end in a treaty with France, because there was no warrant for such procedure in English law.

JOURNAL DU DROIT INTERNATIONAL PRIVÉ ET DE LA JURISPRUDENCE COMPARÉE. Paris. Année V. Nos. III-IV and V-VI. 1878.

The chief feature of this journal, as in former years, continues to be its admirable collection of the recent decisions of almost all the courts of Europe upon questions of private international law. Those of the French courts are arranged, in each bi-monthly number, in the form of a "Dictionary of French Jurisprudence in Reference to International Law." The cases are alphabetically arranged, as in an American digest, and an analytical table at the end of

each year makes each volume of the work in fact an annual digest of the most valuable decisions of this kind. The manner in which the cases are stated deserves all praise. The points decided are given, wherever possible, in the language of the court—that fact being carefully noted by quotation marks. This, with the clear, succinct, official style of the French judges, enables the editor to give, in a very few pages, a more satisfactory account of the case decided, and the reasons of decision, than can often be obtained from our verbose reports. The decisions from other countries than France are arranged in some cases alphabetically, but more frequently in the order of dates of decision, and are often accompanied by valuable notes. Those of the English courts deserve careful study in comparison with the originals. It is to be regretted that the Council of Reporting could not make each of its reporters, whose work is thus condensed, study the *Journal* carefully, and thus learn to dispense with the load of trivial and unimportant facts which form as great a blemish upon recent English reports as a superabundance of ill-considered *dicta* do in the American. In the first double number (January-February) of the current year there is a "Bibliography of Private International Law," or list of books and articles relating to that subject, in its largest acceptance, published in Europe and the United States during the year 1877. The list contains fifteen titles upon international law in general, seventeen upon the public branch, and sixty-one upon the private branch, of the subject. Most of the latter, however, are only articles, of which the *Journal* itself contributes no small share. In the same number is an article on the "Execution of Foreign Judgments in England" (pp. 22-37), by J. G. Alexander, of Lincoln's Inn. In the following numbers are articles on the same subject in Russia (pp. 139-145), by Professor Martens, of St. Petersburg, and in Italy (pp. 234-247), by Professor Pasquale Fiore, of Turin. Another article, which may have a timely interest for some American readers, as well as others, is on the "Seizure in Course of Transit, or in the Exposition, of Goods belonging to Contributors to the present grand Exposition at Paris." (No. III-IV, pp. 81, 110, and No. V-VI, pp. 187-225). Our older readers will remember the litigation of this

kind which followed the unlucky New York Exhibition of 1851. A novel feature of the *Journal*, appearing for the first time in the current volume, is a collection of "Practical Questions and Answers in Private International Law." The questions are put by various correspondents, and brief answers, not extending to the length of a formal article, are furnished by a number of the most distinguished contributors, among whom we notice the name of Hon. Wm. B. Lawrence, the well-known publicist of Newport, Rhode Island.

The V-VI contains an article upon the "Theoretical Basis of Private International Law," this being the introductory lecture with which Professor Brocher, one of the editors of the *Journal*, opened the course in his department at the university at Geneva. It is a presentation of the nationality theory of private international law. It is not admitted that this law rests upon comity; its foundations lie in the very nature of law. There is an instinct which recognizes the existence of the rules which should be followed. It has, also, an historical origin and growth. In ancient times peoples were dispersed in vast nationalities, or in rival municipalities; and hatred and contempt for strangers were universal. But in the Middle Ages we find the germ of a better state of things; numerous small states were so situated and connected that it was impossible for each to consider itself as isolated. There was, in fact, a superior nationality which did not allow them to be complete strangers, though it did not compel them to submit to uniform rules.

We have, then, the law of nationality, as opposed to the law of domicile; the former derived from the strong personal ties which attach families and individuals to their country, the latter derived from the territory in which the individual happens to be. The deduction is drawn that nations should not consider their powers merely, but should rise to the higher plane of duty, and, in treaties, recognise the needs and common interests of all peoples.

In approving the nationality theory, the learned lecturer recognizes the difficulty of its application to criminal law, but suggests that the criminal should be compelled to submit either to the law of his own country or to the law of his asylum.

RIVISTA PENALE DI DOTTRINA, LEGISLAZIONE E GIURISPRUDENZA. Rome. Vol. IV, No. 4.

In the only number which has yet reached us of this review of criminal law about thirty-five pages are occupied with a digest of recent Italian decisions, in the same form with that of the journal above mentioned. The verbal extracts from the courts' opinions are placed, however, in notes occupying a very large portion of each page; and as the type is small, though clear, we are thus furnished with a very satisfactory collection of criminal decisions, well worth the attention of all students of criminal law who can read Italian. "An account of the Prisoners' Friend Society of Rome" (*La Società di Patrocinio pei Liberati dal Carcere dalla Provincia di Roma*), with its constitution and some other documents relating to its work, will also be found [pp. 322-336] in this number, besides a couple of critical articles upon the new penal code of Italy.

KRITISCHE VIERTEL JAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT. München. New Series, Vol. 1, No. 3.

Theories of law have been divided by Bierling—whose work (*Zur Kritik der juristischen Grundbegriffe. I. Theil.* Gotha, 1877) is reviewed by Geyer in this number of this the most interesting of all German legal periodicals—into two great classes; those which find the obligatory force of the law in the character of the legislator, and those which find it in the nature of the law. Each of these is again divided into three groups of theories. The first into (1) the theocratic or religio-political, (2) the natural-absolute, (3) the idealistic group. (The last partakes of the nature of the second class, but belongs here because it assumes the existence of a *Volksgeist*, distinct from all individual minds, and acting in and through the legislator.) Bierling criticises these, and holds (a) that the decision of the question as to the binding force of law cannot be found in any quality of the legislator as prior to, or above, the law; and (b) that the theories of this class all logically lead to the conclusion that what makes the law law is its recognition by the members of the community as the rule of their common life. Or, as the definition is more fully given by B. in another passage, which is worth quoting chiefly for the prominence it gives to the element of recognition

(*anererkennung*): "A legal rule is distinguished from all other rules by this, and this only: that it is uniformly recognised by the members of a certain community or body of men as the rule of their common social life." This "recognition," however (as B. goes on to say), is not to be confounded with a compact. It does not imply a conscious voluntary act, as compact does; it is not a single act expressive of the common will, but an habitual course of conduct with reference to the legal rules so recognized. Neither does it, like a compact, imply at least two distinct contracting parties. It is a constant, uninterrupted, habitual respect for, or sense of obligation toward, or subjection under, certain principles or rules. The recognition of a law, as such, implies that these rules or principles are accepted by the majority of the members of a certain community or political body as the norm and rule of their common social and political life. All this may be accepted, so far as it treats of the importance of recognition as a constitutive element of law, whether we agree or not in B.'s further effort to show that the rules of private corporations, etc., are "*Recht*" in the same sense with the laws of a State.

B.'s second class embraces the theories which find the constitutive element of law, (a) either in its origin from a common will or a common conviction, or (b) in its character as enforceable, or (c) in the ethical nature of its rules. Under a he includes all theories of social compact—that of the popular sovereignty (the sovereignty of a majority of the citizens), the doctrines of the historical school, and that which treats law as a natural organism.

J. A. SNEFFERTS' ARCHIV. FÜR ENTSCHEIDUNGEN DER OBERSTEN GERICHTE IN DEN DEUTSCHEN STAATEN. Neue Folge, III Band. Der ganzen Reihe, 33. Band. III. Heft. Herausgegeben von A. F. W. Preusser. München; Druck und Verlag von R. Oldenbourg.

Readers of the recent *Pandecten*, and similar works by German jurists, must have been struck with the remarkable change in the authorities they quote. 'Down to the time of Savigny and Puchta, the long lists which composed the "literature" of their notes were made up entirely of speculative works, monographs, articles from the legal periodicals, etc. A reference to the report of an actual case was rarely ever found

in their pages. It was not that no such reports existed, although it has more than once been gravely stated by writers whose knowledge of continental law was derived entirely from such works as we have mentioned, that this was the case, and that "Reports" were unknown outside of English law. Collections of such cases have been made for centuries in France and Germany, and some of them have obtained very great reputation. But it was not the fashion to quote them as authority for doctrine. False theories of law, and a misapprehension of an often-quoted passage of the digest—*legibus, non exemplis, est judicandum*—stood in the way. But of late these difficulties seem to have been removed. The student of Windscheid's *Pandecten* will find, on almost every page, references to some of the thirty volumes of the *Archiv* mentioned above. And this substitution of a case in which the doctrine has been subjected to the test of actual life, and proved by its adaptation to life's wants, instead of resting merely upon speculative opinions, cannot fail to prepare the way for a sounder and more trustworthy theory of legal rights and obligations. It is remarkable, too, that the civilians are beginning to make scientific use of reported cases just at the same time that our common lawyers are learning that case law must borrow some aid from scientific jurisprudence, to save it from breaking down under the weight of its own accumulations. In the growing use by each school of the other's methods we see, not only a proof of that increasing uniformity of substantive law among civilized nations which has often been remarked, but also the most hopeful promise of better methods of legal reasoning in future, alike upon the Continent, in England, and upon this side of the Atlantic.

None of the German collections of reports are better adapted to interest and profit the American lawyer than the *Archiv*. It contains within the compass of a single yearly volume (published in four numbers) a selection of decisions from all the German courts. The opinions are carefully abridged, usually in the language of the judges, and the only criticism that occurs to an American reader is that the cases are not always stated with sufficient fullness to make them useful as precedents. But for use in this country this will hardly be a defect. Regarded only as a collection of *dicta* upon interesting

points of law by the ablest judges of Germany, it is well worth the study of our lawyers, who will be surprised to see how large a proportion of the questions most litigated among ourselves at present are passed upon by the German courts, in a form scarcely disguised by the practice and terminology of another system. Thus, we find in the present number, in quick succession—although we open the book almost at random—a case upon the ownership of double windows, considered as fixtures or appurtenances to a house; upon the liability of a carrier for the negligence of his driver when a passenger has thereby been permanently disabled; upon the liability of an employer for the damage done to a neighbor by the person whom he has engaged to erect a house; upon the liability of owners in common to each other for the expense of rebuilding; upon the effect of a covenant not to convey, made by a person otherwise the full owner; upon the existence of a right of way where a third parcel of land partially separates the dominant from the servient estate; upon the measure of damages where growing crops were destroyed by sparks from a locomotive (holding that the railroad company must pay the full value of the ripened crop); upon the liability of the owner of runaway horses for the harm done by the people whom they frighten; and upon the liability of a railroad company for the permanent harm done to a passenger's health by the fright he experienced at the time of a severe accident.

DER GERICHTSSAAL. Stuttgart. Vol. XXX, Nos. 2 and 3.

The second number of the current volume contains an article on "Crimes and Offences against Morality," by Dr. Pillnow, of Bromberg (pp. 106-159). The subject is divided with reference to the provisions of the German Criminal Code, but its interest for an American reader is certainly not diminished by a close adherence to the text of positive law. The grounds of morality are duly aided, with quotations from Sophocles and Aristotle in the original Greek, and Augustine in Latin. But these unaccustomed ornaments should not prevent the common lawyer from recognizing in the article an acute and valuable discussion of the essential elements which constitute a class of offence very imperfectly discussed by our

own writers. Whether the increasing tendency of our courts and people to overlook such offences, or at least to refrain from criminal prosecutions, is not better service to the cause of morality than the public trial of disgusting crimes, reported with all their revolting features by the press, is a different question. But there can be no objection to a purely scientific examination of their criminal character, like the present. — *Wm. G. Hammond, LL.D., in Southern Law Review.*

CURRENT EVENTS.

ENGLAND.

THE TICHBORNE CLAIMANT.—The *London Times* states that the Claimant, whose health has been suffering from his close confinement at the Portsea Convict Prison and his unceasing application to his sewing machine, is now employed upon light labor at the extension works in connection with Portsmouth Dockyard. At first he was made useful in brick-making, but the extreme publicity of the work attracted more visitors than were convenient, and he has been since told off to a somewhat remote part of the yard, near the Inflexible dock, where he is employed in preparing the stocks of offal timber for the periodical dockyard sales. He is much thinner than at the time of the trial, and the convict garb has well nigh deprived him of all individuality.

THE ASSAILANT OF THE MASTER OF THE ROLLS.—The Rev. Mr. Dodwell, the clergyman who fired a pistol in the face of the Master of the Rolls, has written from Broadmoor Asylum to the Kensington Guardians, complaining of the treatment he has received in that institution. The letter was written to the Guardians as they were the persons who had to defray the cost of his maintenance as a criminal pauper lunatic. It was resolved to forward the letter to the Home Secretary, accompanied by a protest against the parish having to pay for the punishment of Mr. Dodwell in the present form when the highest medical authorities had declared that he was not insane.

BANKRUPTCY IN ENGLAND.—Another wail comes from the Comptroller in Bankruptcy as to the predilection shown for liquidations by arrangement. He says that "out of more than

80,000 cases, nearly 52,000 have been under the liquidation clauses of the Act; and that while the annual number of bankruptcies has somewhat decreased, there has been such a continued and rapid increase in the number of liquidations that there were nearly twice as many insolvencies in the year 1877 as in the year 1870." "If," he observes, "the majority of creditors have exercised the powers vested in them with reasonable discrimination, the small number of hostile adjudications, compared with the very large number of amicable arrangements under both the Acts of 1861 and 1869, would prove that during the last sixteen years very few creditors in England have had cause to be dissatisfied with the conduct and state of affairs of their debtors." Clearly the "arrangement" suits somebody. Whether the claims of justice are satisfied is another matter, and the Comptroller evidently thinks this is open to question.

STATISTICS OF LUNACY.—It appears from the annual report of the Commissioners in Lunacy, recently issued, that the total number of registered lunatics, idiots, and persons of unsound mind in England and Wales on January 1 last was 68,538, being an increase of 1,902 on those returned for January 1, 1877. The number of male lunatics was 31,024, and of female lunatics 37,514. The pauper lunatics numbered 60,846, and 7,692 are described as "private patients." This last class includes the soldiers, sailors, and criminal and other lunatics maintained at the expense of the State.

IRELAND.

MR. JUSTICE KEOGH.—The insanity and death of this unfortunate gentleman have recalled to mind an extraordinary speech made in 1852 by his uncle, Mr. James Kelly, of Swinford, County Mayo, Ireland, which created some excitement at the time. Kelly, says a contemporary, was a man of great attainments and vast humor, but as mad as a March hare. He was fond of public speaking, his speeches being generally broad burlesque. In 1862, when Keogh—who with John Saddle had pledged himself in the most solemn manner not to accept office at the hands of any Ministry until certain measures, notably the Ecclesiastical Titles Bill, were conceded—accepted the Solicitor-Generalship from the Aberdeen Administration, meetings were held

in Roscommon, his native county, and Mayo, at which condemnatory resolutions were passed. Kelly addressed a large meeting on the green at Castlebar as follows:—

"MR. CHAIRMAN AND GENTLEMEN,—Who am I? What am I? What is my family? Who are the Kelleys of Swinford? Let me tell you briefly. Since the days of Cromwell—it is quite unnecessary in this assemblage to say bad luck to him—the Kelleys and the Keoghs, and Roscommon, to whom they are unhappily related, have suffered every species of torture and confiscation at the hands of the British Government. The minions of Downing street have plied my family with every instrument of cruelty known to their accursed law. Through their craven vassals at the Castle we have been served time and again, aye, a hundred times in our history, with *subpœna duces tecum*, with the villainous *ne exeat regno*, and even with the brutal *capias ad satisfaciendum* (exclamations of 'Lord save us!') until the big heart of the Kelleys is all but broken. Gentlemen, where are my ancestors? Standing here this night, I would not belie them; and I solemnly declare in the presence of the dead, as it were, and mindful even to jealousy of their reputation, that the shores of Botany Bay and Spike Island are littered with their forgotten bodies. My brother's nephew, Dan Fitzgerald—Lord rest his soul—you all know what became of him. On the perjured evidence of an informer, supported by a disgusting contempt for *alibis* on the part of Judge Lefroy, he was doomed to die for, as alleged, being concerned in the murder of a Scotch land agent. Gentlemen, I am proud to say he died like an Irishman only can die. The landlord, Mr. Browne, of Castle-mountgarrett, went to see him in the condemned cell in the jail beyond, and says he 'Danny, so they're going to hang you?' 'I'm told so,' said my brother's nephew. 'Danny,' said Mr. Browne, 'I'll get up a petition for the commutation of your sentence and send to the castle.' 'Castle be ——' cried Dan—he's dead and I would'n't belie him—'Castle be ——' says he, 'I'll be under no compliment to the British Crown!' And, gentlemen, he died like a patriot Irishman on the gallows tree. But I ask you to turn your eyes from that heart stirring spectacle to the spectacle Ireland is now witnessing with horror. My

own nephew is the principal in this case. He has, indeed, placed himself under a compliment to the Crown. [Here Kelly covered his face with his hands and sobbed for some minutes, the crowd uncovering.] Gentlemen, I am in solemn, serious earnest now. It is a hard matter for a man to curse his own flesh and blood, but I want you to hear what crazy Kelly, of Swinford, has to say concerning his nephew, Solicitor-General Keogh: I curse him for all time. May he die like a dog without the sacraments. A curse be on him and his forevermore. May the grass wither under his feet and water boil in his polluted mouth. The curse of a betrayed people rest on him. May the plagues of heaven consume him, and all the torments of hell pursue him now and hereafter. Gentlemen, I am not a prophet, but the son—the mad son, if you will—of a propheticess. My poor old mother, now nearly a hundred years old, said to me yesterday: 'James, mark my words. Lord Castlereagh cut his own throat. Keogh will cut somebody else's. He will die a madman with blood on his hands cursing and blaspheming the Church. He is a big man to-day and wears a silk gown, but he will spend his last days in a strait-jacket, and his eternity in hell.' That is what my mother says, and God send that it may be fulfilled."

Kelly died in a Dublin mad-house in 1857.

UNITED STATES.

WHO ARE VAGABONDS?—The legislature of Illinois recently passed a measure which gave police magistrates the option, upon the conviction of any one as a vagabond, to fine him \$100 or to send him to the house of correction for sixty days. The act went into operation, and soon the county jail was thronged with "vagabonds." Some of them objected, and by the use of the convenient *habeas corpus* writ, were enabled to dispute the validity of the law. It has been held unconstitutional, as depriving a man of his liberty without giving him a trial at the hands of his peers. The Judge who gave the decision, an ex-member of the Supreme Court, expressed the wish that the Supreme Court as a body might pass upon the question. The legislature, in the Act referred to, gave a very comprehensive definition of vagabonds. It enacted as follows:—"Vagabonds shall include

all persons who are idle and dissolute, and who go about begging; all persons who use any juggling or other unlawful games or plays, run-aways, pilferers, confidence men, common drunkards, common night-walkers, lewd, wanton, and lascivious persons, in speech or behaviour; common rioters and brawlers; persons who are habitually negligent of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families; and all persons who are idle and dissolute, and who neglect all lawful business, and who habitually mis-spend their time by frequenting houses of ill-fame, gaming or tippling shops; all persons lodging in or found in the night time in out-houses, sheds, barns, or unoccupied buildings or lodging in the open air, and not giving a good account of themselves, and all persons who are known to be thieves, burglars or pickpockets habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, or crowded thoroughfare, car or omnibus, or any public gathering or assembly, or lounging about any court room, private dwelling or outhouse, or found in any house of ill-fame, gambling house, or tippling shop." It has been sarcastically observed that under these specifications, about four-fifths of the men in Chicago are in peril of conviction as vagabonds.

GENERAL NOTES.

DUNS IN BRITISH INDIA. — The Mahratta mode of recovering debts is curious. When the creditor cannot get his money, and begins to see the debt is rather desperate, he sits *dhurna* upon his debtor; that is, he squats down at the door of the tent, and becomes, in a certain mysterious degree, the master of it. No one goes in or out without his approbation. He neither eats himself, nor suffers his debtor to eat; and this famishing contest is carried on till the debt is paid, or the creditor begins to feel that want of food is a greater punishment than the want of money. This curious mode of enforcing a demand is in universal practice among the Mahrattas; Scindiah himself, the chieftain, not being exempt from it. The man who sits the *dhurna*, goes to the house,

or tent, of him whom he wishes to bring to terms and remains there until the affair is settled, during which time, the one under restraint is confined to his apartment and not suffered to communicate with any persons but those whom the other may approve of. The laws by which the *dhurna* is regulated are as well defined and understood as those of any other custom whatever. When it is meant to be very strict, the claimant carries a number of his followers, who surround the tent, sometimes even the bed of his adversary, and deprive him altogether of food; in which case, however, etiquette prescribes the same abstinence to himself; the strongest stomach, of course, carries the day. A custom of this kind was once so prevalent in the province and city of Benares, that Brahmins were trained to remain a long time without food. They were then sent to the door of some rich individual, where they made a vow to remain without eating until they should obtain a certain sum of money. To preserve the life of a Brahmin is so absolutely a duty, that the money was generally paid; but never till a good struggle had taken place, to ascertain whether the man was staunch or not; for money is the life and soul of all Hindoos.—*Smith's Journeys.*

CENTENARIANS IN CANADA.—Mr. Wm. J. THOMS, whose name is very widely known as a keen critic of the records of the alleged centenarians, has received from Dr. J. C. Taché, deputy head of the census department of Canada, the report of an enquiry into eighty-two cases of alleged centenarianism. Of the eighty-two, no less than thirty-one claimed to have attained 100 years, nine claimed to be 101, and eleven to be 102; and while only four claim to be 103 and the same number 104, no less than nine put forth the higher pretension of having reached 105. Three claimed to be 106, and the like number 108; only one 109; while four boasted of having reached no less than 110. The three oldest on Dr. Taché's list claim credit for having reached no less than 112, 113 and 120 years respectively. Of these eighty-two cases, Dr. Taché shows that seventy-three have no claim to be considered centenarians, but returns nine as having, in his opinion, claims to be considered as having reached, and, in some instances, outlived a century. Two of the Doctor's subjects, he is

satisfied, reached the ages of 109 and 113; but some of the other claimants had to submit to a remarkable process of rejuvenation, in one case a man who claimed to be 120 proving to be a mere youth of 90. Mr. Thoms' present opinion is that no authenticated case of an individual's living to 110 can be produced, but he is prepared to modify it on satisfactory evidence.—*N. Y. World.*

CORONER'S INQUESTS.—The Attorney-General of the State of Maine makes the following observations and suggestions on this subject: "I doubt if coroners inquests upon dead bodies are of sufficient use to justify their expense, and inquests are often very expensive. These inquests determine nothing. The suspected party is always apprehended by the officers before the jury render a verdict. The verdict is of no use to anybody. It does not acquit nor convict. It is not a single step toward acquittal or conviction. The testimony taken is only useful to the respondent, as it has to be filed in court, and thus the respondent can learn minutely the evidence and make up a defence to fit it. The officers engaged upon the case always look up evidence, independent of the inquest. I think the State can safely abolish the whole antiquated machinery, and, in place of it, simply authorize the State's Attorneys and Sheriff to take the depositions of witnesses. The testimony could be thus collected with celerity, secrecy, and comparatively little cost. The Attorney could determine whether it was of use to prosecute."

COURT DISCIPLINE IN CALCUTTA.—Calcutta barristers, says the *London Graphic*, who are unmindful of the respect due to the Judicial Bench in a certain Court, undergo a very unpleasant penance. The Judge insists on all barristers who appear in his Court donning full gown, wig, and bands in the hottest weather, and if he finds the least attempt at long-winded discourses or impertinence, he has the punkah stopped immediately—a plan which immediately brings back the suffocating lawyer to a proper frame of mind.

CREMATION.—Cremation became legal in Gotha on the 1st instant, when the process was to have been inaugurated by the burning of the body of a deceased engineer in a handsome building specially erected for such ceremonies.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 504.]

Passenger.—See *Railway*, 1.

Patent.—See *Trade-mark*, 1.

Penalty.—See *Judgment*.

Pleading and Practice.—See *Attorney and Client*, 1, 2; *Costs*; *Demurrer*; *Husband and Wife*, 2, 3; *Partnership*, 1, 2; *Quo Warranto*; *Solicitor*.

Principal and Agent.—In 1868, the plaintiff, registered owner of a steamship, consigned it to G. in Japan for sale. G., with the plaintiff's approval, employed the defendant to sell the vessel, and a minimum limit of \$90,000 net cash was fixed as the price. The defendant tried to sell, but without success, and had some correspondence with G., in which he suggested that he would become the purchaser at the price fixed for cash, and himself run the risk of obtaining more on a resale, by means of giving credit; but no agreement was come to on the subject. March 12, 1869, he wrote that he would take the vessel himself at \$90,000. March 17, he sold her to a Japanese prince for \$160,000: \$75,000 cash, and the balance credit. The sale was the result of negotiations extending over some time. The plaintiff received the \$90,000 from the defendant through G., and the defendant finally received the \$160,000 in full from the prince. The plaintiff did not know that the defendant was the purchaser, or of the resale, until June, 1869, when the transaction was ended, and he made no claim on defendant until 1873, although they met frequently. *Held*, that the defendant must account to the plaintiff for the profit made by the resale, and that the plaintiff had not forfeited his right to relief by his laches or by acquiescence.—*De Bussche v. Alt*, 8 Ch. D. 286.

Privileged Communication.—See *Attorney and Client*, 1, 2.

Privity of Contract.—See *Principal and Agent*.

Proximate Cause.—See *Negligence*, 1.

Quo Warranto.—An officer of a board of health was illegally dismissed from his office. On application for *quo warranto* by him, it appeared that he could be legally dismissed by the authority complained of, and that, as matter of fact, he would be if reinstated; and the rule was refused.—*Ex parte Richards*, 3 Q. B. D. 368.

Railway.—1. Plaintiff, travelling on defend-

ant's road, requested a servant of the road to take charge of and put into his compartment his hand-bag, while he went for some lunch. The servant promised to look after it, put it into the compartment, and turned the key, and, when plaintiff came back, said it was all right. On entering the compartment, plaintiff found the bag was missing. The jury found that the proper place for the bag was in the compartment; that the servant was acting as the servant of the company, and within the scope of his employment; that there was no negligence on the part of anybody; and that the bag was stolen by some one unknown. *Held*, that the plaintiff could not recover. The company was not liable as a common carrier, not having complete control of the goods, nor as insurer.—*Bergheim v. The Great Eastern Railway Co.*, 3 C. P. D. 221.

2. 8 Vict. c. 20, enacts that "if any person travel in any carriage" of a railway company, without paying his fare, "and with intent to avoid payment," such person shall forfeit 40s.; that the company may make regulations "for regulating the travelling upon the railway," subject to the provisions of the act; that it may make by-laws for the better enforcing of such regulations, provided, "such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and any person offending against any such by-law shall forfeit any sum not exceeding £5 as a penalty." The respondent company, accordingly, made a by-law as follows: "Any person travelling in a carriage of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling, unless he shows that he had no intention to defraud." Defendant was convicted in a penalty of 10s, under this by-law of riding in a first-class carriage with a second-class ticket, but without intending to defraud the company. *Held*, that the conviction could not stand; for, without deciding whether the by-law was to be construed as exempting from the penalty as well as from the double fare, in the absence of intent to defraud, if the by-law undertook to dispense with proof of intent to

defraud, it was *ultra vires*, and void by said 8 Vic. c. 20.—*Bentham v. Hoyle*, 3 Q. B. D. 289.

3. A railway company, in undertaking to convey luggage to a station, thereby contracts to keep it safely for such a time after its arrival as is reasonably necessary to enable the passenger to get it and take it away.—*Patscheider v. The Great Western Railway Co.*, 3 Ex. D. 153.

Sheriff.—1. A sheriff, with a writ of *f. fa.*, took a keeper to the debtor's house, showed the writ, and said, if the amount was not paid, the keeper would remain in possession. The debtor paid at once. *Held*, that there had been a seizure, and the sheriff was entitled to poundage.—*Bissicks v. The Bath Colliery Co.* *Ex parte Bissicks*, 3 Ex. D. 177; s. c. 2 Ex. D. 459.

2. A sheriff, under a *f. fa.* writ, made seizure of goods, and was then paid the amount by the defendant, without sale. *Held*, that there had been a "levy," and he was entitled to poundage.—*Ros v. Hammond* (2 C. P. D. 300) over-ruled.—*Mortimore v. Cragg*, 3 C. P. D. 216.

Shipping and Admiralty.—F. owner of a ship which went ashore on the coast of France during a voyage from India to England, sent agents to the ship, who saved the whole of the cargo transhipped it and forwarded it to England, and thereby earned freight. The average-stater allowed F. a certain sum—partly general average, partly particular average—for his services in the sale of portions of the cargo which could not be identified, as a commission on disbursements in sending out the lighters, &c., and, generally for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business." *Held*, that the amount could not be recovered from the owners of the cargo. There was no contract to pay it. F.'s object was to earn his freight.—*Schuster v. Fletcher*, 3 Q. B. D. 418.

Slander.—Where the court has laid down that the occasion on which the words complained of were uttered was privileged, it is for the plaintiff to show affirmatively that the defendant acted maliciously, or from an improper motive, and not from a sense of his duty, and *bona fide*.—*Clark v. Molyneux*, 3 Q. B. D. 237.

The Legal News.

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THE ORANGE PROSECUTION.

We have noticed from time to time, under the head of "Current Events," the leading incidents of the prosecution directed against certain reputed members of the Orange Association in Montreal. The last event to which reference was made was the charge of Mr. Justice Ramsay to the Grand Jury (*ante*, p. 477). The substance of that charge, his Honor has since stated from the Bench, has received the concurrence of his colleagues of the Court of Queen's Bench, and must be taken as an authoritative declaration of the law. Since the date of that address, the trial of the alleged Orangemen has taken place, and resulted in an acquittal. The defendants were tried on two indictments. The first, under the common law, was for unlawful assembly. That is to say, even supposing that the Orange Association is a legal organization, it was charged that the defendants by assembling to walk in procession, were guilty of a breach of the peace, or of an act tending to such breach.* On this indictment the prosecution put in some evidence, but at the close of the case, the presiding Judge (Ramsay, J.) directed the Jury to acquit. The other indictment was under the Statute, chap. 10, C. S. L. C., for being members of an unlawful association.† This prosecution also failed, for the reason that no direct or satisfactory proof

* The indictment, against the defendants jointly, charged that they "did then and there unlawfully assemble and gather themselves together for the purpose of walking in procession through certain public streets in the said City of Montreal with badges, emblems and regalia calculated to give offence to and excite the hatred of a large number of liege subjects of our Lady the Queen, and cause horror and alarm, in defiance of a proclamation of the Mayor, &c., * * * and then and there well knowing that such assembling of themselves and others would provoke a breach of the peace," &c.

† The indictment against each defendant separately charged him with being a "member of the Society known as the Loyal Orange Association, the members whereof bind themselves and assent to an engagement of secrecy of the following import, &c., such engagement of secrecy, not being required and authorized by law," &c.

could be made that the defendants were members of the Orange Association. The only witnesses who could testify to the fact, declined to answer, on the ground that they would incriminate themselves, as their knowledge of the fact involved the admission that they were themselves Orangemen. When the defendants were discharged, the presiding Judge is represented to have said that "they now knew whether their society was within the law, and if they continued to remain in a society which was contrary to law, they put themselves in great peril, for it might happen that a case would arise where there would be a witness to complete the evidence." His Honor, therefore, holds clearly that the Orange Order comes within the Statute respecting seditious and unlawful associations, and for our part, we have never been able to see any good reason to question the soundness of this opinion.

In connection with this case, we have received a copy of the opinion given by Messrs. Wurtelle and Curran, in which a view differing somewhat from that taken by Messrs. Bethune, Carter, Ritchie and Barnard, (*ante*, p. 371) is expressed. The former gentlemen hold that the Orange Association is prohibited by the Statute, chap. 10, C. S. L. C., and its members "cannot possess any right to hold meetings, nor claim as such the right to walk in procession and make public displays" in the Province of Quebec; but since the repeal in 1851 of the Act to restrain party processions in certain cases, 7 Vict. c. 6, no statute exists which would authorize the civil or other powers to disperse a procession of Orangemen passing through the public highways in a peaceable manner." The opinion appears at length in another part of this issue.

ELECTION LAW.

In connection with the election of a member to the Commons for the County of Jacques Cartier, several points of interest in the Dominion electoral law have been presented for decision. The candidates were Messrs. Lafamme and Girouard, and the returning officer having declared that the former had received a majority of the votes, a recount of the ballots by a judge was demanded. This took place before Mr. Justice Mackay. His Honor held that his duty under the Act consisted in seeing whether the

deputy returning officers had improperly counted, or improperly rejected any ballots, or had made a wrong addition of them; that he had no power to hear evidence or to examine the returning officer or the deputy returning officers. His Honor was disposed to allow considerable latitude in the mode of making the cross on the ballots, and he was also disposed to admit ballots the only objection to which was the omission of the deputy, returning officer to initial the number on the back. Under sect. 56, the deputy returning officer was bound to number and paraph any objection made to a ballot. "If he did not," his Honor remarked, "he neglected his duty, but the law did not go on to say that such ballot was null and void. He did not see why a voter should lose his right because the deputy returning officer had omitted to paraph a number, an omission with which the voter had nothing to do." The result of the recount was that Mr. Girouard was declared to have a majority of the votes, and he was returned accordingly.

A prosecution was subsequently instituted against several persons for frauds perpetrated at poll No. 2, in the same county. The charge was that a number of votes cast for Mr. Girouard had been abstracted from the ballot box. Several witnesses being called to prove that they had voted for Mr. Girouard, and that their ballots were not among those returned by the deputy returning officer, it was objected to this evidence that a voter could not be permitted to reveal for whom he had voted, but the Court, Ramsay, J., presiding, overruled the objection, remarking that sect. 77 of the Election Act applied only to a legal proceeding to test the validity of an election, and not to a criminal cause like the present, arising out of a contravention of the law.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

LAFLEUR et al., (contestants in the Court

below,) appellants; and THE CITIZENS' INSURANCE Co., (*tiers saisis* in the Court below), respondents.

Insurance—Condition requiring Notice of other Insurance—Waiver.

A person effected an insurance against fire, for one month, the insurance being subject to the conditions of the fire insurance policies of the company. He asked for a policy, but was told that it was not customary to issue policies for short dates. Among the conditions of the fire policies of the company was one requiring notice of any other insurance effected on the property, and endorsement of such insurance on the policy. The insured failed to give such notice. *Held*, that the non-delivery of a policy to the insured was a waiver on the part of the company of the condition cited.

The question was whether the failure to give an insurance company notice of other insurance effected on the same property, under the special circumstances, rendered the insurance void. One Limoges went to the Citizens' Company and insured his property for one month. He got a receipt for the premium, which stated that he was insured for one month, subject to the conditions contained in the ordinary policies issued by the Company. On getting the receipt he asked the clerk for a policy, but the clerk replied that it was not usual to issue policies for short dates. Limoges then went away, and effected another insurance in the Royal Canadian. He gave no notice to the Citizens' Company of this insurance. Three days afterwards a fire occurred. His creditors, the appellants, having attached the insurance money, the Company declared that they owed Limoges nothing, and when the declaration was contested, they pleaded that by one of the conditions of their policies the insured was bound to notify them of any insurance existing elsewhere. The question was whether the insured was bound by the usual condition of the Company's policies, where no policy issued.

The Court below held the insurance to be void.

The majority of the Court of Appeal, Ramsay, Tessier, and Cross, JJ., reversed this judgment. The reasons are sufficiently set forth in the *considérants* which are as follows:—

"The Court, etc.:—

"Considering that in and by the receipt and undertaking made and delivered by the Respondents, the said Citizens' Insurance Company, to François Xavier Limoges, on the 28th of August, 1876, it was therein in effect declared

that they, the Citizens' Insurance Company, had received from the said Limoges, the sum of \$5, being the premium of assurance against loss or damage by fire effected with the Company to the extent of \$2000, on a brick encased building in course of construction, on Champlain street, Point St. Charles, near Montreal, (including carpenters' risk) for one month, subject to the conditions of the fire insurance policies of the said Company;

"And considering that the said brick encased building was destroyed by fire on the night of the 31st of August, and morning of the 1st of September, 1876, and that the said F. X. Limoges thereby suffered damages to an extent exceeding the amount of the insurance effected thereon, and although it has been pleaded and established in proof on behalf of the said Citizens' Insurance Company, that one of the conditions of their fire policies is to the effect and in the words following: "The assured must give notice to this Company of any other insurance effected on the same property, and have the same endorsed on this policy, or otherwise acknowledged by the company in writing, and failure to give such notice shall avoid this policy;" and that after the delivery to said Limoges of said receipt and undertaking on the said 28th day of August, 1876, he applied for and obtained from the Royal Insurance Company a like receipt and undertaking insuring the same property to the extent of a further sum of \$1000, whereby (*sic*) notice was not given nor allowance thereof made in writing before the said fire on any policy of the said Citizens' Insurance Company; yet it has been established and proved that upon the delivery to him the said Limoges, by the said Citizens' Insurance Company of the aforesaid receipt and undertaking, he asked for and was refused a policy by the said last named company;

"And considering that if the said François Xavier Limoges was under any obligation in respect to such notice and allowance, it was thereby suspended and waived until such policy should be delivered to him, which was not done;

"And considering that upon delivery to him of a policy containing said condition, he was entitled to a reasonable delay to give to the said Citizens' Insurance Company said notice, and get the said allowance in writing;

"And considering that in the said judgment rendered by the Superior Court at Montreal, on the 28th day of June, 1877, dismissing the contestation made by the said appellants to the declaration of the said Citizens' Insurance Company, as garnishees in this cause, there is error;

"This Court doth reverse," &c.

Sir A. A. Dorion, C. J., and Monk, J., dissenting, held that the insured was bound by the condition.

Judgment reversed.

De Bellefeuille & Turgeon for appellants.

Abbott, Tai, Wotherspoon & Abbott for respondents.

COOBY (petitioner in the Court below), appellant; and THE CORPORATION OF THE COUNTY OF BROME (defendants in the Court below), respondents.

Voting on the Dunkin Act—Irregularity.

Held, that in a vote of the ratepayers under the Dunkin Act, the failure to keep one of the polls open during the day of voting was a fatal irregularity.

DORION, C. J., differing from the majority of the Court, remarked that the county of Brome passed a by-law to prohibit the sale of intoxicating liquor within the municipality, and it was provided that the by-law should be submitted to the electors for ratification. The voting took place on the day appointed, and there was a majority for the by-law. The appellant, Cooby, petitioned that the by-law be set aside, first, because the County Council has no jurisdiction to pass such a by-law; secondly, because the by-law was never properly ratified by the electors, inasmuch as in one township—West Bolton—no poll was held, and no vote was taken on the by-law. It was admitted that the poll was not held according to law in this township, and the questions presented for the consideration of the Court were: First. Had the County Council the right to pass the by-law? Second. Did the failure to take the vote in one township annul the voting generally? It was unnecessary to go into all the legislation. As to the question whether the Provincial Legislature in adopting the Municipal Code had repealed so much of the Temperance Act of 1864 as authorized County Councils to enact prohibitory by-laws,

his Honor thought it had not, and the powers of the County Council and the local Council co-exist. The County Council of Brome, therefore, had the right to pass the by-law in question, and to prohibit altogether the sale of liquors within the County of Brome. The second question was whether the vote had been properly taken. The judge in the Court below [Dunkin, J.] held that as the failure to hold a poll in West Bolton could not have affected the result, the irregularity was not material. It appeared that the returning officer opened the poll at ten o'clock, but there being no one to vote, he closed the poll at once, instead of waiting the half hour required by law. There was no complaint on the part of the petitioner that there were any voters who were prevented from voting, or that any injury had been done by closing the poll immediately. He founded his complaint merely upon this, that a formality of the law had not been observed, and not that its non-observance had any effect upon the vote. The question was, was this formality so rigorous in its nature that the absence of it annulled the election? In Parliamentary elections, it had been held that an election would not be annulled because of an irregularity which had no effect on the result. His Honor was disposed to coincide with the view taken by the Judge of the Court below, and to say, first, that the County Council had the right to prohibit the sale of intoxicating liquors; and, secondly, that the failure to keep the poll open at one place for half an hour, not having any effect upon the general vote, did not annul the proceeding. There had been a question raised as to whether the case was appealable. The Judges were all agreed that the case was undoubtedly appealable.

The majority of the Court reversed the judgment, on the ground that the irregularity was fatal. The *considerants* are as follows:

"The Court, etc.

"Considering that it has not been legally proved or established that the by-law in question in this cause, entitled by-law No. 28, passed by the Municipal Council of the County of Brome, held on the 14th March, 1877, prohibiting the sale of intoxicating liquors, and the issuing of licenses therefor within the said County, has been in due form of law approved of by the municipal electors of the said county of Brome by a duly ascertained majority there-

for, and more especially it appears by the evidence adduced, that the mode adopted for taking the votes of the municipal electors of the Township of West Bolton, a subdivision of the said County, on the question of the approval or rejection of the said by-law, was irregular, illegal and insufficient; that in fact no poll was held for the taking of said votes of the municipal electors of said Township in manner or form as required by law, and that consequently said by-law is inoperative, null and of no effect:

"And considering that in the judgment of the Circuit Court for the District of Bedford, sitting at Sweetsburgh, on the 11th of July, 1877, there is error, this Court doth cancel, annul, and set aside the said judgment," &c.

Judgment reversed.

O'Halloran, Q. C., for appellant.

W. W. Lynch for respondents.

LARCENY.

What facts, or what condition of circumstances, constitute, or fail to establish, the crime of larceny, has always, and, so long as the law on the subject remains ill defined as it is at present, will always be a matter of profound difficulty to the judicial mind to determine the meshes of the law, or, if we may be permitted to say so, the interstices between the meshes are of such dimensions, that in some cases it is a matter of case for the knowing criminal to escape thereby into the open; while, again, fine distinctions are drawn at times by the judges on acts, which, to the lay mind, seem innocent, but which are by the former adjudged to be of a criminal nature. Some weeks ago the following facts were proved before one of the metropolitan police magistrates: the prisoner was intrusted by his master with a check for the purpose of having it cashed; the prisoner got the check cashed, failed to deliver the proceeds to his master, and appropriated the money to his own use; it was held by the learned magistrate that upon these facts he was not warranted in convicting the prisoner of, or committing him for, larceny. Now as is well known, there are three factors which go to make up the crime of larceny: (1) The *asportatio*, (2) the *animus furandi*, and (3) the *inventus dominus*. Which of these three factors were wanting in this case? The *animus fu-*

randi, if it exists at all, must precede the *asportatio*; if there be no *asportatio*, there can be no "outward and visible sign" of an *animus furandi*. Sir J. Fitzjames Stephen, in his Digest of Criminal Law, lays it down (pp. 194-5): "The violation of rights of property may be by the misappropriation of property intrusted by the owner to the offender." And here we come to the distinction which evidently governed the learned magistrate in this case. A man may retain the property in a thing, though he may part with the possession. We are landed in this case on the horns of an awkward dilemma: (1), if the owner of the check had divested himself of the property in the check, would not such an act have amounted to an actual gift of the check to the recipient; and (2), if possession of the check only were intended to be passed to such recipient, would the owner, in whom the original *proprietas* of the check was vested, be debarred from resuming (so far as he could) his full *proprietas* in such check, by any dealing, wrongful or otherwise, by the temporary possessor of such check? To put a somewhat parallel case: A gives his servant £1 to purchase a hamper of victuals to bring back to A. The servant purchases the hamper as directed but abstracts therefrom certain of the victuals, and this phase of the case brings us a step further. Are not the victuals in the constructive possession, and therefore the property of A? If so, there can be no doubt that larceny has been committed by the servant. We doubt whether, on the authority of Reed's case, Dears. 168,257, the crime would not be consummated, whether A gave his servant the £1 or not; but it is not material to decide this question: 24 & 25 Vict. c. 96, s. 72. The difficulty under which the judicial mind labors is, that it is very doubtful, under any given state of circumstances, whether the three necessary factors of the crime are made out. But the real question must depend upon whether the prisoner had, or had not, the *animus furandi* at the time when the property, or, at least, the possession, was delivered to him; and the question that is here raised is one solely of law. The facts in Reg. v. Middleton, 28 L. T. Rep. N. S. 777, were as follows: A depositor in a post office savings bank obtained (the report does not say how) a warrant for the withdrawal of 10s., and presented it to

a clerk at the post office, who placed, by mistake, £8, 16s. 10d. on the counter. The depositor took the same. The jury, upon trial, found, as a fact, that the prisoner had an *animus furandi* when he took the money. This conviction was upheld on appeal upon the above grounds; but four judges out of fifteen were desirous of quashing the conviction on the ground, not that the case of *animus furandi* was not made out, but that the money was not taken *invito domino*. This case shows the divergence of judicial opinion as to what facts do or do not establish a case of larceny. In the case alluded to above, viz: a servant intrusted with a check for the purpose of cashing it, another question may be asked: Was not the master in the constructive possession of the check, while the said check was in the actual possession of the servant? i. e., had the master ever actually parted with his property in the check? If not, there can be no doubt that the servant was guilty of larceny. But again could not the servant be regarded as a bailee? In whom would then the title to the property be vested? And suppose such bailee were himself, forcibly or otherwise, deprived of the property, in whom would the property vest? Surely the subject-matter does not become temporarily a *res nullius*, liable to be reduced into possession by the first occupier, who would in this instance be the bailee. How is the master to reduce the proceeds of the check into possession, so as to confer on himself a legal title to that to which he is undoubtedly morally entitled? If we do not admit the principle in such a case that the possession of the servant is *pro hac vice* the possession of the master, i. e., that the master retains the constructive possession throughout the transaction, we shall be opening a ready door to the criminally disposed, of which they are sure on every possible occasion to avail themselves. We are well aware that the learned magistrate is apparently warranted in the course he took. In Regina v. Walsh, (R. & R. 215; Archbold, 395), the defendant, a stockbroker, received from the prosecutor a check upon his banker to purchase Exchequer-bills for him; the defendant cashed the check and absconded with the money. Upon an indictment for stealing the check and the proceeds of it, it was holden to be no larceny, although the jury found that,

before he received the check, the defendant had formed the intention of converting the money to his own use; not of the check, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him; and because, being the prosecutor's own check, and of no value in his hands, it could not be called his goods and chattels; nor of the proceeds of the check, because the prosecutor never had possession of them, except by the hands of the defendant. It will be observed in the above case, two of the ingredients necessary to constitute the crime of larceny are wanting, viz: (1), the *asportatio*, and (2), (almost as a necessary consequence) the *in vitis dominus*. The element in the crime, which to the lay mind would appear most difficult to find, is here clearly and apparently without hesitation found. In the face of 24 & 25 Vict. c. 96, ss. 1, 3, we think the above verdict, on the facts, would not stand. But the case is interesting, as illustrating what subtleties of distinction the judges of half a century ago admitted; it would almost seem that they went out of their way to devise methods whereby parties clearly guilty of at least a grave moral offence might escape. In a subsequent case (*Reg. v. Metcalf*, 1 Mood. Crim. Cas. 433), the prisoner, who acted as occasional clerk to the prosecutors, was indicted for stealing a check. The check, made payable to a creditor, was given to the defendant to deliver to the creditor. Defendant appropriated it to his own use. It was held by nine judges (one *dubitante*) that defendant was guilty of larceny. Now, this case is really more on all-fours with the case which came before the learned magistrate than the preceding. The only difference is that here the prisoner was to get the check cashed and to deliver the proceeds to his master; in the case quoted the prisoner was to deliver the check, as a check, to another person. The act, then, of converting a check, with which one is entrusted, into cash, and then appropriating such cash to one's own use, is divested of criminality. If such really is the law, it would be desirable to import the civil doctrine of relation into such transactions, and presume the three ingredients of larceny against the prisoner upon the proof of the facts, as above, and call upon such prisoner to rebut any one of such presumptions. The question did not, and could not, arise here, whether the subject matter of the

theft was or was not the subject of larceny. The prisoner, so far as it appears to us, was discharged on the ground that the money, the proceeds of the check, had never been reduced into the possession of the prosecutor; but, for reasons given above, we think this position is untenable.

We propose to consider in a subsequent article the remedy, suggested by the Code of Indictable Offenses, to meet the serious defect, if such defect can be said to have any legal existence. —*London Law Times*.

CURRENT EVENTS.

CANADA.

THE LEGALITY OF THE ORANGE ASSOCIATION.—

The following is the opinion of Messrs. Wurtelle and Curran, referred to on page 517:

To the St. Patrick's National Association of Montreal.

Having been requested by your Association to give you our opinion on the status of the Orange Association and of its members in the Province of Quebec, we examined the statutes relating to the matter, and after careful consideration we now proceed to answer your questions in the order in which they were submitted to us.

Question 1.—Is the existence of the Orange Association in this province illegal and prohibited by law?

Answer.—The sixth section of chapter ten of the Consolidated Statutes of Lower Canada, intituled "An Act respecting seditious and unlawful associations and oaths," enacts that every society or association of which the members are required to keep its acts or proceedings secret, or of which the members take or bind themselves by any oath or engagement not required or authorized by law, or of which the members take, subscribe or assent to any test or declaration not required by law, and every society or association which is composed of different divisions or branches or of different parts acting in any manner separately or distinctly from each other, or of which any part shall have officers elected or appointed by and for such part, shall be unlawful combinations and confederacies; and that every person who becomes or acts as a member of any such

society or association, or who maintains intercourse with or aids or abets any such society or association, shall be deemed guilty of an unlawful combination or confederacy. The ninth section exempts Lodges of Freemasons constituted under the authority of warrants from any Grand Master or Grand Lodge of Great Britain or Ireland; and an amendment passed in 1865 29 Victoria, chapter 46, extends the exemption to lodges of Freemasons constituted under the authority of warrants from the Grand Master or Grand Lodge of Canada. The seventh section of the statute imposes the punishment of an imprisonment for a term not exceeding seven years in the penitentiary, or for a term less than two years in the common gaol, upon any person who may be convicted upon indictment of having been guilty of such unlawful combination or confederacy.

This Statute is in force in the province of Quebec, and we are of opinion that the Orange Association falls within the description of societies mentioned, and that its provisions make the lodges established within its limits unlawful combinations and confederacies, and render their members liable to the punishment above mentioned.

Question 2.—Are their meetings and processions and public displays prohibited by our statutes?

Answer.—The Orange Association being prohibited by the statute above mentioned, its members cannot possess any right to hold meetings nor claim as such the right to walk in procession and make public displays in the Province of Quebec; but since the repeal in 1851 of the "Act to restrain party processions in certain cases," 7 Victoria, chapter 6, no statute exists which would authorize the civil or other powers to disperse a procession of Orangemen passing through the public highways in a peaceable manner. The law declares certain societies, within which we are of opinion that the Orange Association falls, to be unlawful combinations and confederacies, but it restricts its mode of enforcement to the individual punishment after conviction upon indictment of their members or abettors.

Question 3.—Can any Orangeman for administering the Orange oath to initiate an Orangeman, be criminally prosecuted under our Statute?

Answer.—The Statute of Canada, 37 Victoria, chapter 37, prohibits the administering of all oaths not authorized or required by law, it declares any person administering an oath not so authorized or required, to be guilty of a misdemeanor, and to be liable to an imprisonment not exceeding three months, or to a fine not exceeding \$50.00, at the discretion of the court. The oath to initiate an Orangeman is neither authorized or required by law, and any person administering it would therefore render himself liable to be prosecuted under this Statute for the misdemeanor created by it, in addition to the liability under which he lies for being a member of an unlawful society, under chapter 10 of the Consolidated Statutes of Lower Canada.

Question 4.—Can known Orangemen be arrested for attending as such their meetings or processions?

Answer.—Any person who becomes or acts as a member of a society prohibited by the chapter above mentioned of the Consolidated Statutes of Lower Canada, may be indicted as being guilty of unlawful combination or confederacy. Being of opinion as above stated that the Orange Association falls under the prohibition of the Statute, we hold that persons attending, as members, its meetings or processions within the Province of Quebec, are liable to be proceeded against under its provisions.

Question 5.—Can the known President or Secretary of such Association be prosecuted under our Statute?

Answer.—We are of opinion that they can.

Question 6.—Can the Officers of the said Association be forced to produce their form of oath and minutes of proceedings, and to testify generally in case of such prosecution?

Answer.—They would be required and compelled, like any other witnesses to answer all questions and to produce all papers under their control, of which the answer and production would not criminate themselves.

Question 7.—What legal means would you advise to have the question of the legality or illegality of the existence, processions, displays, &c., of the Orange Association in the Province of Quebec, determined so as to remove all doubt on the question hereafter?

Answer.—The way to obtain a judicial decision on the question of the unlawfulness in this Province of the Orange Association, would be

to lay an information against a member, charging him with being guilty of an unlawful combination and confederacy, in breach of the provisions of chapter 10 of the Consolidated Statutes of Lower Canada.

J. WURTELE, Q. C.,

J. J. CURRAN, Q. C.

Montreal, 24th July, 1877.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 516.]

Sale.—1. W. Blenkiron & Son, a well-known and responsible firm, did business under that style at 123 Wood Street. One A. Blenkarn ordered goods of the respondents by letter, dated "37 Wood Street." The letters were signed without any initials, and in a manner to look very much like "Blenkiron & Co." Respondents sent the goods to Messrs. Blenkiron & Co., 37 Wood Street, supposing they were dealing with W. Blenkiron & Son. A. Blenkarn was subsequently convicted under an indictment for falsely pretending, in obtaining these goods, that he was W. Blenkiron & Son. Meantime, the appellants had bought in good faith some of the goods of A. Blenkarn. The respondents brought trover for the goods. *Held*, that there was no contract of sale between the respondents and A. Blenkarn, and accordingly he could give, and the appellants could acquire, no title to them.—*Cunly v. Lindsay*, 3 App. Cas. 459; s. c. 1 Q. B. D. 348; 2 Q. B. D. 96.

2. Plaintiff and one P. made a contract for a lot of lumber, to be purchased of P. by plaintiff, and shipped from time to time as it was ready. Subsequently, P. shipped a lot of six hundred tons on a ship chartered by him, by the order and for the account of the plaintiff. The bills of lading stated the goods to be shipped by P., to be delivered "to order or assigns" of P. Plaintiff insured the cargo. P. drew a bill of exchange on the plaintiff, and indorsed it to one C., with the bills of lading. C. discounted the bill at defendant's bank, handing the bank the bills of lading with it. Plaintiff declined to accept the bill without the bills of lading. Thereupon P. drew a second bill to the order of C. on the plaintiff, which was given the defendants in place of the first, "upon the terms of the delivery of the bills of lading to the

plaintiff, upon payment of the second bill of exchange." The bills of lading and the bill of exchange reached the plaintiff the same day, the bills of lading "to be given up against payment of" the draft. Plaintiff refused to accept the bill of exchange, and returned it to defendant bank, stating he should pay it at maturity. The cargo was then entered at the custom-house in the name of the defendant. Afterwards, plaintiff offered to pay the bill on receiving the bills of lading, and to give a guarantee for the freight, which the defendant bank pretended to think itself liable for. This was refused, and defendant subsequently sold the cargo. The jury found that P., as well as plaintiff, intended the cargo should be the property of plaintiff on shipment, subject to a lien for the price. *Held*, that the property in the cargo had passed to plaintiff, and he could recover from the defendant bank.—*Marabita v. The Imperial Ottoman Bank*, 3 Ex. D. 164.

3. Property was sold at public auction under certain conditions. The auctioneer entered in his book the names of the seller and the buyer, the description of the property and the price, but made no reference to the conditions. *Held*, not to be a sufficient memorandum in writing to satisfy the Statute of Frauds.—*Rishton v. Whatmore*, 8 Ch. D. 467.

4. In 1873, G. borrowed £450 of H., giving a verbal promise to give a bill of sale when demanded. H. died in 1874, and her executors were told by G. that he had promised to give a bill of sale, and was ready to do so at any time. They did not demand it; and, in 1877, the executors, hearing that a writ had been served on G., asked for and received a bill of sale of all G.'s property, except book-debts. There was no recital as to when the advance was made, *nc.* of a past promise. The document was duly registered the next day; and two weeks afterwards, being the 17th, G. was served with a debtor's summons. G. notified the executors, who took possession on the 19th, advertised and sold the property on the 23rd. Subsequently, G. was adjudged bankrupt. *Held*, that the bill of sale was not good against creditors.—*In re Gibson. Ex parte Bolland*, 8 Ch. D. 230.

Salvage.—1. In an action of salvage against a ship on behalf of the owners, master, and crew of tugs, it appeared that one tug,

while towing a vessel, saw the ship ashore and in distress, and went off her course to notify the other tug of the accident, and the other tug proceeded to the spot, and saved the ship. *Held*, that both tugs were entitled to salvage.—*The Sarah*, 3 P.D. 39.

2. The steamship S., in distress from a collision, signalled the steamship C., and transferred to her the passengers and some of the cargo. Attempts to tow the S., by the C. failed, and she was abandoned, and her crew were taken on board the C., and they, with the passengers and cargo saved, landed in port. In an action by the owners, master and crew of the C., against the saved cargo of the S., life-salvage was claimed, and also salvage for services to the S., and in saving the cargo. The owners of the cargo cited in the owners of the S., who appeared. The owners of the cargo asked that such portion of the salvage awarded as was life-salvage the owners of the S. should be required to pay. Refused, on the ground that no property of the owners of the S. was saved.—*The Cargo ex Sarpedon*, 3 P. C. 28.

See *Shipping and Admiralty*.

Settlement.—1. Defendant, when an infant, agreed to give seven houses to his intended wife, when he came of age. Fourteen years after the marriage, he executed a post-nuptial settlement, giving nine houses—among which were the aforesaid seven—to trustees, for the separate use of his wife for life, then to himself for life, with power of appointment in the wife as to the disposition after the death of the survivor, and, in default of appointment, in trust to the wife in fee. No reference was made to the above agreement, and it was recited that he had made no settlement in favor of his wife on the occasion of his marriage. Afterwards he agreed to sell three of the houses; and, in action for specific performance, *held*, that there had been no ratification of the agreement as to the seven houses made when the defendant was an infant; that the post-nuptial settlement was voluntary, and there must be specific performance as to the three houses.—*Trowell v. Shenton*, 8 Ch18. D. 3.

2. In 1855, a marriage settlement was executed by D., to make provision for his intended wife and the children of the marriage, by which land was given in trust to such uses, &c., as D. and his wife should appoint, and, in default of appointment to D. for life; remainder to the

wife for life; remainder to the children as tenants in common in fee; remainder, in case of the death of all the children under twenty-one without issue, to the heirs and assigns of D. There was a proviso that the trustee or his successor should, after the death of the survivor of D. and his wife, leaving a minor child, receive the rents and profits of such child's share, and, after paying for the child's maintenance, &c., invest the balance, and accumulate it for those who should become ultimately entitled to the share from which the same came. There was no power of sale. In 1860, D. and his wife mortgaged the land to E., and appointed it to him, subject to redemption; and E. covenanted to reconvey on payment of the debt and costs to such uses, &c., as the property was then subject to. There was a power of sale providing that the balance of the proceeds of the sale, after deducting the debt and costs should be paid over to "D., his heirs, executors, administrators, or assigns." In 1869, D. died intestate, leaving his wife and children surviving. In 1875, the mortgagee sold the premises under his power, and held the balance subject to the order of the court. *Held*, that D.'s administratrix took the surplus as personal property. There was no resultant trust.—*Jones v. Davies*, 8 Ch. D. 205.

Solicitor.—Where a plaintiff's solicitors of record in London employed his country solicitors to get evidence, and one member of the country firm did all the business alone, but had some affidavits sworn to before his partner, *held*, that these affidavits were inadmissible.—*Duke of Northumberland v. Todd*, 7 Ch. D. 777.

See *Attorney and Client*, 1, 2.

Specific Performance.—See *Contract*, 2.

Surety.—One E., an insurance agent, committed acts which his principal, an insurance company, was advised amounted to embezzlement, and the company ordered his arrest. Thereupon, some friends of E. had an interview with the company's manager, and proposed an arrangement by which the company should be secured and E. go free; but the manager refused to consider it. Later on the same day, the company was advised that E.'s acts did not amount to embezzlement, and the order for his arrest was thereupon countermanded. Two days after, E.'s friends, not knowing the order for arrest had been topped,

and not being informed of it by the company, made an arrangement by which they became sureties for E., by depositing a sum to be held as collateral security for the payment by E. of the amounts due the company from him. The sums not being paid, the company sued for this deposit against the sureties, and the latter brought a cross-action to annul the agreement. *Held*, that the agreement was not binding on the sureties, as having been made by them under the supposition that E. was liable to be arrested, to which supposition they were led by the company. *Seem*, also, that the agreement was bad, as savoring of compounding with felony; but the court would interfere actively, and not stay its hand in a such a case.—*Davies v. The London & Provincial Marine Ins. Co.*, 8 Ch. D. 469.

Taxes.—A taxing act must be construed strictly, *per* the Lord Chancellor (LORD CAIRNS).—*Coz v. Rabbits*, 3 App. Cas. 473.

Trade-mark.—The plaintiff got a patent for a kind of floor-cloth, in 1863, and continued the sole manufacturer thereof until the expiration of the patent. He devised the name "Linoleum" for his article, and no one else had ever undertaken to use that name until after the expiration of the patent, when the defendants proposed to manufacture the article under that name. *Held*, that the plaintiff was not entitled to protection in the sole use of the name.—*Linoleum Manufacturing Co. v. Nairn*, 7 Ch. 834.

2. W. owned all the collieries in the parish of R., except one belonging to the "W. Coal Co." For some time prior to 1873, W. worked her collieries, using her own name and the designation "The R. Coal Works." In 1868, the defendants set up at R. as coal merchants, styling themselves "The R. Coal Company." Thereupon, in 1873, the plaintiff changed her style to "W.'s R. Collieries." In 1875, defendants bought out C. & Co., bankrupt retail coal dealers at G., in Surrey, and continued their business there, advertising themselves "The R. Colliery Proprietors, . . . (Late C. & Co.) . . . Supply direct from the collieries." This was followed by a specification of kinds of coals mined at plaintiff's R. collieries. On their office they put "The R. Colliery Proprietors, Coal Office." The plaintiff remonstrated, and the sign was changed to "The R. Coal Co., Colliery Proprietors, Coal Office." Subse-

quently, in 1876, defendants for the first time became proprietors of a colliery, by leasing one not in the parish of R., but within a district called the "R. District," all the coal from which was known in some places as "R. Coal." *Held*, that the defendants were not authorized to use the designation "The R. Colliery Proprietors," they having no colliery in the parish of R., or to use any form implying that they sold coal from that parish; and that it was unnecessary for the plaintiff to prove actual damage to entitle her to prevail.—*Braham v. Beacham*, 7 Ch. D. 848.

Trust.—1. A testatrix devised real estate to D., her solicitor, and M., a neighbor, whom she saw very little of, as tenants in common, absolutely and free from any trust. She had told her solicitor that she wished to leave her property for charitable purposes, and he had explained to her that she could not so dispose of her real estate. M. had no communication with the testatrix about the matter, and did not know until her death that the property had been given to him. D. explained to her, when she proposed to leave the property to D. and M. absolutely, that they could put the money in their own pockets if they chose; and she replied that she was aware of that, and intended to give it absolutely, and she had no doubt they would make a good use of it. Appended to the will was a statement signed by the testatrix stating that she had made the gift to enable D. and M. to assist certain institutions in which they knew she was interested, in case they saw fit, and not otherwise; but that she had imposed no secret trust upon them, nor had they given her any promise to apply the money in any way but for their personal benefit. *Held*, that there was no trust imposed either upon D. or M., and the devise was good.—*Rowbotham v. Dunnell*, 8 Ch. D. 430.

2. Bequest of £3,000 to trustees, to hold for the three minor daughters of testator's deceased daughter until the youngest survivor thereof attained twenty-one, and then to divide the principal and accumulation among the survivors. The trustees were directed to apply the whole or such part of the income, as the trustees should think fit, to the maintenance and education of the daughters while under twenty-one. The father of the legatees applied to have the whole of the income paid him for

their education and maintenance, instead of a small portion thereof allowed him by the trustees. His income was only £200 a year; he had five children by a second marriage, and had contracted debts in maintaining the three daughters of his first wife at school. *Held* that the court could control the discretion given the trustees; and it was ordered that the trustees pay the whole of the income to the father for the future, as well as what had already been withheld and accumulated.—*In re Hodges. Davey v. Ward*, 7 Ch. D. 754.

Ultra Vires.—See *Company*, 1; *Contract*, 2; *Railway*, 2.

Vendor and Purchaser.—See *Sale*.

Waiver.—The defendant executed a deed covenanting to pay the plaintiff £400 on demand with interest; and it was provided that the debt should run two years, if the interest should be "punctually" paid; and the defendant charged his leaseholds with the debt, and agreed to give a formal mortgage on them on demand. Six months' interest becoming due and not being paid, the plaintiff demanded the £400 and interest or a formal mortgage. The defendant paid the interest, and the plaintiff gave a receipt for it "without prejudice to the notice." He offered to accept an instalment of £100. *Held*, that neither receipt of the interest nor the unaccepted offer operated as a waiver of plaintiff's right to recover the whole at once.—*Keene v. Biscoe*, 8 Ch. D. 201.

Warranty.—See *Charter-party*.

Way.—The defendant owned a house with a gateway under it, and a yard in the rear, partly covered. The road under the gateway and the yard were paved with stones, and there was no other approach to defendant's stables in the rear, where he kept his horses; allowing his vans, when not in use, to stand in the yard. Defendant leased the yard to the plaintiff, with power to erect a building suitable for his business of gas-engineer. Plaintiff was not "to obstruct the entrance and gateway, except by the use of the entrance for the purposes of ingress and egress." Plaintiff erected his building, to which, as to the stables, there was no approach except by the paved way. Plaintiff applied for an injunction to restrain the defendant from obstructing the way with his vans, and alleging damage to his business from such obstruction. *Held*, that under the lease he had

a general right of way unobstructed.—*Cannon v. Villars*, 8 Ch. D. 415.

Will.—1. A testator directed his executors "to pay my . . . debts out of the proceeds of my property." Then followed, "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell" four pieces of landed property named "for its full value." A fifth piece was then devised to W. for life, remainder to F., ultimate remainder to T., and T. was made residuary legatee. Several legacies were given. The will was written on three sides of a sheet of paper; the signature and attestation were at the bottom of the third page. The fourth page contained a schedule of testator's landed property, and was headed "Schedule referred to within." It contained the four pieces ordered to be sold; and at the bottom of the schedule the statement that the fifth "is not included in the above schedule, it being willed by me to W.: my executors have no control over it." The schedule was signed by the testator, and bore the same date as the will. The attesting witnesses to the will knew nothing about the schedule. *Held*, that the schedule formed no part of the will, and could not be referred to in construing the will; but that by the will proper all the real estate, except the specific devise to W., was to be turned into money for the general purposes of the will, and that what remained went to T., the residuary legatee, and not to the heir-at-law.—*Singleton v. Tomlinson*, 3 App. Cas. 404.

2. H. died April 16, 1852, leaving a will, by which he devised real estate to trustees for his wife, during her life or widowhood, and, upon her second marriage, for certain trusts named during her life, and then to G. M. absolutely. He then gave personal property in trust to pay the income to the wife until her second marriage; and upon that event "all the bequests" in her favor were to cease, and she was to receive £500 a year during her life, to be paid from the rents of the real, and any deficiency to be made up from the income of the personal estate; and the trustees were to accumulate the balance until her death, and then pay it over in certain legacies specified. As to the residue of the whole personal property and the income thereof, and the rents from the real property accumulated at the wife's death, he

gave it to T. M. absolutely. The wife married in 1854, and her annuity was paid until the present time, and the surplus accumulated. On a case made for instructions as to the disposition of the accumulation, *held*, that under Thellusson's Act there was no valid disposition of the surplus rents and income from April 16, 1873, until the death of the wife, and T. M. was not entitled to it as residuary legatee.—*Weatherall v. Thornburgh*, 8 Ch. D. 261.

3. A testator devised the residue of his property to his wife for life, and at her death, absolutely to such of the children of his late sisters as should survive his wife, and being males should attain twenty-one, or being females should attain that age or marry. "But, in case any of such children shall be dead at my decease leaving issue, then I direct that such issue shall take.... the share of their deceased parent." *Held*, that the issue of a niece of the testator who died before the date of the will could take nothing.—*West v. Orr*, 8 Ch. D. 60.

4. A testator bequeathed to trustees "the sum of £3,000, to be applied by them in supporting or founding free or ragged schools for gutter-children, or for the poorest of the poor;" and added in a codicil, that "such school or schools should be situated in the parish of B. for the resident poor of said parish." For some years prior to the testator's death, there had been such a school maintained by him in a hired room in B. *Held*, that the gift was in the alternative, and that a bequest for "supporting" such a school could be made without violation of the Mortmain Act, which forbids a testamentary gift to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments" for a charity.—*In re Hedgman*. *Morley v. Croxon*, 8 Ch. D. 156.

5. A testator died possessed of, *inter alia*, £2,900 Egyptian nine-per-cent. bonds, shares in two corporations, an interest in a copyright, a leasehold house where he lived, and a leasehold house held for a term determinable on the death of one H., and a policy for £3,000 on H.'s life. By his will, he gave some pecuniary legacies, made specific bequests of his plate, books, and apparel, of £2,400 of the Egyptian bonds, and of all the other property above specified. The residue he gave to his nephew

A., mentioning expressly therein his carriage and furniture. After the date of his will, the testator married, and thereupon made a codicil to his will, giving his wife the income for life in all his property, postponing "the payment of all legacies, and the distribution of all estates vested in me, or over which I have any power of disposition or appointment, until after her decease." Between the date of the will and the date of the codicil, the testator sold the Egyptian nine-per-cent. bonds, and bought with part of the proceeds other Egyptian bonds, called Khedive bonds. E., the legatee of the leasehold, depending on the death of H. and of the policy on H.'s life, was to receive "all the bonuses and additions thereto," and "pay the future payments in respect thereof." By the provisions of the policy, the holder could take the bonuses either to increase the sum insured, or in part payment of the premiums. *Held* (BAGGALLAY, L. J., diss.), that the residue must be converted, and the income paid the widow during her life; that the Khedive bonds formed part of the residue, the specific legacies of the Egyptian nine-per-cent. bonds having been adeemed when the bonds were sold; that the furniture formed part of the residue; that the houses must be added to the capital insured; and the premiums must be raised by mortgaging the policy.—*Macdonald v. Irvine*, 8 Ch. D. 101.

GENERAL NOTES.

THE LATE MR. HILLIARD.—Francis Hilliard, the well-known legal writer, died at his residence, Worcester, Mass., on the 9th ult. He was born at Cambridge, Mass., in 1806. He was graduated at Harvard College in 1823. After his admission to the bar he practised for some years. He was at one time a Judge of the Massachusetts Insolvency Court, and also sat in the Massachusetts Legislature. But he is best known to the profession, by the legal treatises bearing his name, comprising treatises upon Elements of Law, (a second edition of which in two volumes has just been issued) Injunctions, Bankruptcy, Contracts, Mortgages, New Trials, Taxation, Torts, Remedies for Torts, Real Property, Sales, Vendors, etc., several of which have passed through from two to four editions.

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ASTILL v. HALLÉE.

Chief Justice Meredith, in this case, decided by the Court of Review, at Quebec, (Meredith, C. J., Casault and Caron, JJ.) on the 31st of December last, and reported at 4 Q. L. R., pp. 120-146, has given an elaborate opinion on the rights of consorts who have been married abroad and subsequently have become domiciled in the Province of Quebec. In answer to a petitory action by the plaintiff as heir-at-law of her father, claiming a lot of land in the Parish of St. Henri, it was contended by the defendant, that although Mr. and Mrs. Astill were married in Vermont, where the law of community is unknown, yet having after their marriage established their domicile in Lower Canada, community existed between the consorts, and the widow was entitled to half of the real estate acquired in this Province after their domicile was established here. In the court of first instance, the Superior Court, Quebec, this contention was maintained by Stuart, J. but this decision was reversed in Review, on which occasion the learned Chief Justice pronounced the careful and exhaustive judgment adverted to. His Honor began by referring to the conflicting opinions of Dumoulin and D'Argentré. The former of these authors supported the doctrine that, in the absence of an express contract, the community is to be considered as originating, not merely from the law, but from the tacit agreement of the parties, on marrying, to adopt the law of the matrimonial domicile, and that such agreement has the same effect as an express agreement with respect to property subsequently acquired by the parties wherever it may be situated. D'Argentré enunciated a different opinion, but Dumoulin was sustained by the great authority of Pothier, concurred in by Duplessis, Guyot, Merlin and others. His Honor reviewed various arrêts which show that the jurisprudence of France was well established, and then noticed the decisions of our own courts on the subject. The most famous of these is *Rogers v. Rogers*, decided at Montreal

in 1848, and which has since been regarded as an authoritative expression of the law. The terms of that judgment are:— "Considering that there never was or could be a community of property between the father and the mother of the parties in this cause, they having married in England, the place of their domicile, and no contract of marriage having been previously entered into, and that the transferring of their domicile to Lower Canada, where they died, could not have the effect of establishing such a community of property between them, contrary to their presumed intention at the time of their marriage."

Decisions to the same effect have been rendered at different times in other cases, and the judgment of the Court of Review, following the jurisprudence thus established, reversed the decision of the lower Court. The leading points of Chief Justice Meredith's opinion are as follows:

"That according to the well-established jurisprudence of the parliament at Paris, for more than two centuries before that tribunal was abolished, a community of property was held not to exist between persons, who having married without contract, in a place where the law of community did not exist, afterwards established their domicile, and acquired property, in a country where the law of community did exist;

"That according to the same jurisprudence, the law of community was considered rather as a *statut personnel* than as a *statut réel*;

"That the same jurisprudence has been invariably observed by the Courts of this Province;

"That the doctrine upon which that jurisprudence is founded is approved of by the most esteemed commentators on the Code Napoléon."

THE LATE CHIEF JUSTICE HARRISON.

We have to notice this week the premature death of the Hon. Robert Alexander Harrison, late Chief Justice of Ontario, which occurred at Toronto, on the 30th ultimo. Mr. Harrison was one of the most youthful judges who ever held high judicial office, having been born in Montreal on the 3rd of August, 1833, and appointed to the bench, as the successor of Sir Wm. Richards as Chief Justice of Ontario, on the 8th of October, 1875. He was of Irish parentage, and was educated at Upper Canada College and

the University of Toronto. In 1855 he was called to the bar "with honors," but had previously been appointed chief clerk of the Crown Law Department for Upper Canada, an office which he held up to 1859. During this period and subsequently, he was not only a constant contributor to the legal and political press, but edited some works of enduring merit, well known to the profession, among which may be mentioned "Robinson and Harrison's Digest of cases decided in the Queen's Bench and Practice Courts," "The Common Law Procedure Act," and "The Municipal Manual of Upper Canada." From 1868 to the general election of 1872, he represented West Toronto in the House of Commons, and initiated some important measures. His professional occupations were very heavy, being retained on one side or the other in almost every case of note, and during the brief period which has elapsed since his elevation to the Bench, he has dispatched an immense amount of judicial business. His career affords a rare example of successful industry and perseverance, and his premature death cannot but excite the deepest regret that the Province and the country have been deprived of his eminent services.

JUDICIAL EMOLUMENTS.

If there be consolation in the reflection that others are still worse circumstanced than ourselves, the underpaid judiciary of Canada may find a crumb of comfort in the fact that in Vermont the salaries of the Supreme Court judges are placed at the figure of \$2,500 per annum, and a bill is actually before the Legislature to reduce this magnificent emolument to \$2,000. It is clear that the Vermonters believe in plain living as the best regimen for hard-worked men. Our contemporary, the *Albany Law Journal* pertinently remarks: "A salary of \$2,500 is not usually regarded as extravagant for a competent judge of a court of last resort, even in those States where judicial talent is not rated high. The Supreme Court of Vermont has always enjoyed a good reputation for ability, but we much doubt if that reputation can be maintained at the figures proposed. Even the most disinterested judge could hardly afford to serve the State for remuneration so inadequate and so much below what he could make at the bar."

In connection with this topic, we may refer to

the scale of remuneration in some other places. An official report which has just appeared in France, states that the salaries of the Court of Cassation, consisting of fifty-six members, are equal in the aggregate to \$210,000. The salary of the first president is \$6,000 per annum. The other three presidents each receive \$5,000 a year. The forty-five councillors have \$3,600 each, while the salaries of the six *procureurs-généraux*, and *avocats-généraux* vary from \$3,600 to \$6,000. The cost of the several courts of appeal is estimated at \$1,207,260, which is divided amongst 26 first presidents, 92 other presidents, 617 councillors, 94 *procureurs-généraux*, and *avocats-généraux*, and 61 substitutes. The salary of the first presidents is usually \$3,000, while the other presidents for the most part get only \$1,500.

If we wish to go where judicial talent seems to have been recompensed on the humblest scale we must betake ourselves to Cyprus, the new acquisition of Great Britain. The salary of the judges who formerly constituted the Court at Larnaca, according to the *Times'* correspondent, was about £2 per month; but it is supposed that "a certain class of fees from suitors, not strictly defined by law, were found evocative of zeal." However this may be, the addition of an English assessor to the Court has caused the collapse of the tribunal. All irregular fees having ceased under the new régime, one of the members of the Court has resigned, and another has persistently absented himself on private business, and the authorities are puzzled to devise a means of supplying the vacancies. The *Solicitors' Journal* suggests, in case all other measures fail, that they should resume the system of judicial remuneration which for several hundred years contented the judges of another island within the British dominions. The judges of the Royal Court of Jersey, down to a recent date, were remunerated by a dinner at the opening of the *assize d'héritage*, which was paid for by the Queen's Receiver out of the revenues arising from the crown property in the island.

THE LATE LORD CHELMSFORD — Lord Chelmsford, (F. Theisger), an ex-Lord Chancellor, died at London, Oct. 5, aged 84. Sir Frederic Theisger was one of the most distinguished barristers of the age. The present Lord Justice Theisger is a son of deceased.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, J.J., DUNKIN, J. *ad hoc.*

AITKIN (plff. in the court below), APPELLANT; and THE NATIONAL INSURANCE COMPANY (defts. below), RESPONDENTS.

Insurance—Increase of Risk.

An insurance was effected on a saw-mill, without disclosing the fact that the building contained a planing machine. *Held*, this was a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void.

The judgment appealed from was rendered on the 7th July, 1877, by the Superior Court, Montreal, Rainville, J., the principal *motif* being as follows:—

"Considering that it is proved there was in the building a planing machine which was in operation before and at the time of the fire, and that this increased considerably the risk and chances of fire."

DORION, C. J., said that the action was brought upon a policy of insurance issued by respondents on a saw mill and machinery, situated at Acton. There were a number of pleas, one of which was that it was not disclosed at the time of the insurance, that the saw mill contained a planing machine, and that this planing machine increased the risk; that this was a material fact which it was incumbent on the insured to disclose, and that the concealment of it rendered the insurance null and void. Another plea set up that it was one of the conditions of the policy, that the mill, which was a steam saw mill, should not be worked by night without the written permission of the Company being obtained, and that the mill was worked at night without permission. There were also pleas of over valuation, &c. The Court below dismissed the action on the ground that the insured had not disclosed that there was a planing machine in the saw-mill, and that this was a material fact, the risk being thereby increased. It appeared that Mr. John-

son, who owned the mill, had an insurance in the Canadian Mutual, and his agent went to the National, and asked them if they would take it, as the Mutual was giving up business. The National took over the risk, without a new application being filled in. The original application was produced, and the planing machine was there described, but there was no evidence that the Company, defendant, ever saw the application. There was no fraud to be imputed to Mr. Johnson, but where a material fact is not disclosed, the insured could not recover. The Court was of opinion that the risk was materially increased by the fact that the planing machine was in the mill; and there was also the fact that the mill was worked at night without the consent of the Company. On both grounds the judgment was right, and it must be confirmed.

Doutre & Co. for appellant.

Lunn & Davidson for respondents.

FULTON (plff. below), Appellant; and McDONNELL et al. (defts. below), Respondents.

Sale—Covenant.

Under a covenant to sell and convey "all the estate right, title, interest, claim or demand" that the vendors had in certain lots specified, an action for damages cannot be maintained against the vendors for failure to deliver the whole of the lots mentioned, where they had included by mistake a lot to which they had no claim.

DORION, C. J., said that the representatives of the late Hon. Alexander Grant, in 1874, agreed by a writing to sell to the appellant, John Fulton, certain lots of land at Cote St. Antoine. The writing was in these terms: "We, the undersigned heirs of the late Hon. Alexander Grant, hereby agree to sell and convey to John Fulton, all the estate, right, title, interest, claim or demand, that we, or either of us have, or may have, as heirs of the late Hon. A. Grant in, to or out of 14 lots of land (numbers of lots mentioned), being part of what is known as the "Fisher Farm." It appeared that when the vendors came to fulfil the contract, it was found that lot No. 18, (one of those enumerated in the agreement) did not belong to the heirs Grant, and that it had been included in the sale by error. The purchaser not being able to get this lot, instituted an action of damages, to which the vendors pleaded that they were not bound to

guarantee the delivery of any of the lots, as they had only sold such rights as they had. They further pleaded that the whole quantity of land that plaintiff bought was there, though lot 16 was not in it. Some proof had been made as to the effect of such an agreement in Ontario. The case, however, had to be decided by the law of this Province, and as to the law here there was no difficulty. The Court below dismissed the action, and the Court here was of opinion that the judgment was right. By the agreement the vendors only sold the rights they had, and there was no guarantee. The only thing that the purchaser would be entitled to would be a deduction of a certain portion of the price, if it had been paid. Upon this ground the judgment would be confirmed.

J. C. Hatton for appellant.

Lunn & Davidson for respondents.

COURT OF REVIEW.

Montreal, Oct. 31, 1878.

TORRANCE, PAPINEAU, JETTÉ, JJ.

[From S. C., Montreal.

In re HATCHETTE, Insolvent, and HATCHETTE, Petitioner, and ROBERTSON et al., Contestants.

Insolvency—Composition—Reconveyance of Estate.

Held, that so soon as a deed of composition and discharge has been executed in accordance with the provisions of sec. 52 of the Insolvent Act of 1875, the assignee is bound under section 60 of the Act, to reconvey the estate to the insolvent, without waiting for the confirmation of the deed by the Court or Judge.

Judgment confirmed.

Macmaster & Co. for Contestants.

Davidson & Co. for the Insolvent.

COLLISIONS ON THE HIGH SEAS.

The following paper on the necessity of an International concert to punish criminally the non-observance of the international rules of navigation for the prevention of collisions on the high seas, was read before the recent Frankfurt Conference of the Association for the Reform and Codification of the Law of Nations, by Sir Travers Twiss, D.C.L., Q.C., vice-president of the association.

The application of steam-power to sea-going vessels has worked so great a change in the

conditions of ocean navigation as to render it necessary for nations to concert a common system of rules for the navigation of vessels on the high seas, with a view to prevent accidents from collision. It is obvious that the two ancient cardinal rules of navigation, which had hitherto sufficed for the guidance of sailing vessels on the high seas, namely, that vessels going free should give way to vessels on a wind, and that the vessel on the port tack should always give way to the vessel on the starboard tack, are insufficient for the safe guidance of vessels navigated under steam-power, and not under sail. Although the same principles of navigation might still be properly maintained in the case of steamers where applicable, it has been found requisite that the rules of navigation should be extended to other cases, seeing that the course of steamers is not governed exclusively by the wind, and that a steam vessel is enabled by a skillful use of her steam power to manœuvre in a manner, which is impracticable for a sailing vessel. Great Britain was amongst the leading states to set the example. She commenced by laying down formal rules for the navigation of steam vessels on her own rivers, and after some experience extended the rules to her own vessels on the high seas, and she included her sailing vessels under a reciprocal system of obligation when approaching steam vessels. British admiralty courts were also authorized by British statute law to regulate their judgments in cases of collision between British vessels on the high seas in accordance with the new rules. In due course of time, after experience had given its sanction to those rules, Great Britain entered into treaty arrangements with foreign powers, that their vessels should be navigated on the high seas under the same system of rules, and she has authorized her admiralty courts to apply the new rules to every vessel, whose flag has been brought, with the consent of its government, within the operation of the new rules. Cases of collision on the high seas have thus been brought by a common international concert under a new system of law, which has been built up on the lines of the ancient customs of the sea as far as possible, the steam vessel being regarded as a vessel going free, and able to get out of the way of a sailing vessel more readily than a sailing vessel can get out of the way of

a steam vessel. I do not propose to discuss the details of the international sailing rules. Modifications have had to be made in them from time to time to meet new difficulties, which experience has discovered, and such modifications have been the result of a common concert between the maritime powers. My object at present is to consider how the observance of the sailing rules on the high seas can be best secured, and how the neglect of them, if it be the result of carelessness or willfulness, may be most effectively punished.

Under the ancient law of the sea, every collision on the high seas may be the subject of a civil action for damages in any admiralty court; but however culpable may have been the conduct of those in charge of either vessel, British admiralty courts, which exercise their civil jurisdiction indiscriminately between vessels of all nations, carefully abstain from exercising any criminal jurisdiction over the crews of foreign vessels in respect of their neglect to observe the sailing rules, nor has Great Britain been empowered by any treaty arrangement with foreign States to authorize her courts to exercise any such criminal jurisdiction. Yet it would seem to be in accordance with reason that, where States have agreed upon a common system of rules of navigation for the prevention of collisions on the high seas, they should agree upon a common system of penalties for the non-observance of those rules on the part of the persons, who may have been in charge of the navigation of any vessels which have come into collision on the high seas. This common concert is the more necessary, because the modern theory of a ship being the territory of the nation, under whose flag it sails, would otherwise be in the way of the tribunals of any other nation exercising corrective jurisdiction over those on board of the ship in respect of any misconduct on their part whilst the vessel is on the high seas. The personal responsibility of mariners who navigate the high seas remains, in regard to foreign nations, precisely such as it was before any sailing rules were agreed upon amongst the maritime powers; in fact the mariner had no personal responsibility toward the owner or crew of any foreign vessel with which he may bring his own vessel into collision on the high seas, unless his act should be done with a malicious intention to destroy the other vessel,

which may clothe it with a piratical character.

The ancient law of the sea, which is universally received amongst civilized nations, regards ships as chattels, the management of which on the high seas is not so thoroughly under the free control of the owner or his servants, inasmuch as the sea is a treacherous element, that he or they should be held criminally responsible for any damage caused by one ship to another ship in the course of navigation. The owner of the ship, however, in the case of collision, is not allowed by the law of the sea to escape scot-free, if his servants mismanage his vessel on the high seas, and through their unskillfulness bring about the collision with another vessel. The ship itself in such a case may be arrested by the process of an admiralty court, and if the servants of the owner are found to have mismanaged her navigation, and by such mismanagement to have brought her into collision with the other vessel, the owner may be amerced in the value of his ship, which may be sold by an order of the admiralty court, if the owner is otherwise unable to satisfy the judgment of the court. This result is brought about by what is termed an "*actio in rem*," a tradition of the ancient Roman law. It is totally opposed to the territorial theory of a ship, which is of modern origin, and has been devised as a convenient fiction to explain the subjection of a ship and its crew to the municipal law of the country under whose flag it is navigated. But this theory, like everything else which rests on a fiction, has its inconvenience. Whilst it is useful for maintaining discipline on board of a ship when it is on the high seas, which are *nullius territorium*, it is mischievous as securing territorial impunity to the master and crew in the management of their vessel, in its relation to other vessels on the high seas.

The international responsibility of mariners, under which term I include all persons engaged in the navigation of a ship, is thus in fact of a negative character; they are taken to be the agents of the owner or of the charterer of the ship, as the case may be, and their employer is responsible for any mismanagement on their part of the navigation of his vessel. The owner or the charterer, on the other hand, under the modern system of marine insurance, is able to shift his risk, which is strictly pecuniary, on

to the shoulders of the underwriter: and the underwriters are the parties in the present day who institute and defend actions in *rem* in most causes of collision, which are brought into the admiralty courts. There is thus no direct *solidarité*, to use a convenient French phrase, between those who are employed in the navigation of a vessel on the high seas and those upon whom the burden of compensation falls, in case the navigation is mismanaged and a collision takes place with another vessel. The question becomes still more complicated where loss of life ensues, of which several painful instances have occurred of late, in which the magnitude of the calamity has been so appalling, as to awaken a general demand for some legislation on the subject, by which the feeling of personal responsibility may be brought home to the mariner, and may stimulate him to greater watchfulness and greater care in avoiding all chances of collision with other vessels.

I beg leave to suggest to the consideration of this conference the important question of criminal jurisdiction in cases of collision, how best it may be exercised, and under what safeguards, where the collision has happened on the high seas. It seems to me, that States which have formally agreed that certain rules of navigation shall be observed by their respective subjects in navigating the high seas, and which have intrusted to their courts of admiralty or to maritime tribunals of equivalent authority within their respective dominions civil jurisdiction, in respect of damage to property resulting from the neglect of those rules, may properly authorize the same courts to punish mariners, who transgress those rules and thereby bring about the damage. The measure of punishment, however, in such cases ought not, in my judgment, to be determinable by the municipal law of the state before whose tribunals the parties happen to be convened, but by a *common law* concerted by the same states, which have adopted the revised rules of navigation as the common law of the sea. There is something peculiar to accidents on the sea, something which gives to every collision on the high seas a tinge of misfortune. The navigation of the high seas is in some respects dependent on "the snares of fortune," to use a phrase familiar to Bracton. That great master of the common law of England draws a

wide distinction between homicide with a purpose and homicide as a result (*ex eventis*), and according to this distinction homicide is either felony or a misfortune. Our ancestors seem to have thought that any homicide in former days, which was the result of a collision on the high seas between sailing vessels, where there was no felonious intent on either side, might be properly regarded as a homicide by misfortune (*homicidium per infortunium*). The question in the present day is whether the application of steam power to ocean navigation has so altered its conditions, as to warrant us in introducing a new category of punishment in cases, where steam vessels have come into collision with one another on the high seas. The collision between the German steam vessel *Franconia* and the British steam vessel *Strathclyde* in the open sea within a marine league of Dover pier has been thought by many persons to establish the necessity of some international arrangement for the punishment of those who have transgressed the rules of navigation in cases where the vessels brought into collision are of different nationalities. The degree of culpability, however, will always be a very delicate question to determine; witness the loss of H. M. steamship *Vanguard* by a collision with a consort steamship in a fog, and the loss of the Imperial German steamship *Kurfurst* by a collision with a consort steamship in broad daylight. Still such anomalous collisions, although they may bespeak caution, are not dissuasive of all legislation, and the subject is one which is likely to attract every day more attention, if collisions between steamships on the high seas continue to multiply at their present rate.

CURRENT EVENTS.

EUROPE.

CONGRESS OF SCANDINAVIAN JURISTS.—After an interval of three years, says the *London Law Times*, a congress of Scandinavian jurists, comprising representatives from Denmark, Sweden and Norway, has again been held at Christiana. The principal question brought on the tapis for discussion was that of the advisability of adopting a jury system, somewhat similar to that obtaining in England, in the three countries above referred to. For some considerable

time, in the case of Sweden, the lay element has been represented in the administration of justice; but the tendency is to repress rather than to extend any further development in this direction. A partial adoption of the system, viz., in political and criminal cases, has long been promised by the Danish Rigsdag, but has never been practically fulfilled, and, so far as we can gather from the views expressed by the members of the congress, a complete introduction of the jury system is highly improbable. As to Norway, a practical difficulty—sparseness of population and the consequent impossibility of convening a sufficient quorum—has in spite of the strenuous endeavors in this direction of some of her politicians, proved an insurmountable obstacle to the establishment of the system. These countries seem anxious to incorporate into their respective legal polities a system somewhat analogous to our own English jury system. But they should bear in mind, that the jury system, as it exists in England, is not the creation of a moment, or the creature of positive enactment. In this country trial by jury has been part and parcel of the Constitution, and the system has insensibly adapted itself to the growth and development of the Constitution. We would further remind these countries, that in spite of the cogency of its claim to our consideration on account of its long-tried merits, and though its excellence has been only lately acknowledged by our Legislature by an express provision in the Judicature Act, 1873 (§72), "that nothing therein contained . . . should affect the law as to jurymen or juries," the system is at present being subjected to severe criticism, and may before long be considerably modified. Let these countries, then, bide their time, and watch what further developments trial by jury may undergo in the home of its birth before they adopt a system which is avowedly novel and unknown to themselves.

ENGLAND.

PERISHABLE GOODS.—In *Coddington v. Jacksonville, etc. Railroad Co.*, 39 L. T. Rep. (N. S.) 12, the question as to whether bonds of American railway companies were goods of a perishable nature, came up under an application for an order for their sale pending the litigation. Vice-Chancellor Hall refused the application, saying

that the bonds were not goods of the nature mentioned. The *Law Times* says, that recent general experience "would appear to point to these securities as of about the most perishable and evanescent species of goods imaginable."

TREATMENT OF JURORS.—A committee of English judges, in a report respecting Circuits, make the following suggestion about juries: "The present system of locking up juries in cases of felony might, we think, be usefully amended, as it does in practice tend unnecessarily to lengthen the time consumed in criminal trials on circuits. The fact that a jury cannot separate during a trial for felony led in former days to sitting on to finish a case half through the night and sometimes longer, when the power of attention on the part of the jury had long been exhausted, and in consequence much injustice was often done. Public opinion would not now tolerate such a practice, and quite rightly; but the result is that a judge often will not begin a long case in the afternoon, from the extreme inconvenience of locking up a jury for the night, and so time is lost. As a rule, we think this, with other distinctions between the procedure in felonies and misdemeanors, may safely be abolished; but we are disposed to think that a judge should be intrusted with the power of keeping a jury together, in his discretion, in all criminal cases, misdemeanors as well as felonies, a power not likely to be often exercised, but one which it may be useful to possess."

THE LAW OF LIBEL.—The *Law Journal* says that, notwithstanding Fox's Act, the English judges constantly take upon themselves to tell juries point blank, not only "this is a libel" but "this is a libelous publication;" that it is a malicious libel, a malicious publication of defamatory matter. Some of them are honest enough to admit that they do this because they do not accept the law as declared in Fox's Act. Thus the Lord Chief Justice, with characteristic frankness, has repeatedly declared that he believes his great predecessor, Lord Mansfield, was right in respect to the law on the subject, and he and most of the judges still follow the old practice in actions or prosecutions for libel, and tell the jury positively that the publication is libelous. This was done in the last case of criminal information in the Queen's Bench for

libel, and the result was a conviction. It has been generally conceded by the best judges that the rule established by Mansfield was never correct, and that Fox's Act only declared the law of libel as it was, and it is extraordinary that the English judges should return to the old perverted rule at this day, when the whole tendency of the law is and ought to be to widen and enlarge the liberty of public discussion.

UNITED STATES.

A LOWE DOCKET.—The Supreme Court of the United States met on Monday, 14th ult. All the judges were present except Judge Field, who was detained in California. The docket contained 849 cases.

CANADA.

ASSIGNEES' DISCHARGES.—A point of vital interest to assignees in insolvency was decided by his Honor Judge Mackenzie, on Wednesday last, viz., that it is not necessary for assignees to apply to the court for a discharge from their position in cases where there has been a composition accepted by the creditors, and the assets reconveyed to the insolvent thereunder. The sections of the present Insolvent Act governing the applications for such discharges, are 47 and 48. As the latter section lays an assignee neglecting to apply within the time limited, liable to a severe penalty, it is obviously a matter of considerable importance that there should be no doubt about the cases to which the statute applies.

The doubts which have surrounded the subject have been occasioned by the peculiar language of the 47th section, which provides that the assignee shall make his application to the court, "after the declaration of a final dividend, or if after using due diligence, the assignee has been unable to realize any assets to be divided;" but further on, when specifying what the statement to be prepared for the assignee shall show, the section enacts that it shall disclose "the amount of dividends or of composition paid to the creditors of the estate." Notwithstanding the use of the word composition here, the learned judge holds that the intention of the Act is to require this application to be made for the protection of the creditors only, and that by taking a matter out of the

assignee's hands they render it unnecessary for him to make the application.

The latter clause of the section referred to is explained, by applying it to cases where a composition has been accepted after the estate has been partially wound up by the assignee. This construction of the Act seems reasonable, for surely an assignee should be compelled to bring his accounts before the court only in the case of the concern being wound up by him. When a composition has been accepted, the creditors have nothing to do with the costs or assignee's expenses, which must be borne by the insolvents. One lesson which insolvents can learn from this is that assignees have no right to retain anything out of the assets of the estate for their discharge, at least such must in future be regarded as the law in the County of York.—*Monetary Times.*

RECENT UNITED STATES DECISIONS.

[The references are to the following volumes of State Reports: 82 Illinois; 57 Indiana; 18 Kansas; 67 Maine; 46 Maryland; 123 Massachusetts; 36 Michigan; 54 Mississippi; 65 Missouri; 68 New York; 78 North Carolina; 84 Pennsylvania State; 7 South Carolina; 3 Texas Court of Appeals; and 10 Vroom (New Jersey Law).]

Affinity.—A party to an action before a justice of the peace, had formerly been married to a wife (who had died before action brought) who was related to the justice's wife. *Held*, that the justice was not disqualified to act in the case.—*Trout v. Drawhorn*, 57 Ind. 570.

Agent.—Plaintiff, being possessed of a promissory note, indorsed and delivered it to defendant for negotiation; instructing him to return it, or the proceeds of it, on the next day, and not to let it go out of his reach without receiving the money. Defendant delivered the note to a third person, who promised to get it discounted, and did so, but embezzled the proceeds. *Held*, that defendant was liable for a conversion of the note.—*Loverty v. Snetken*, 68 N. Y. 522.

Alteration of Instruments.—The alteration of a promissory note by one of its makers, by increasing the amount for which it is made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as

do not consent thereto, even in the hands of a bona fide holder for value.—*Greenfield Savings Bank v. Stowell*, 123 Mass. 196.

Arbitration.—It is no ground for setting aside an award, that the arbitrator had been counsel in another case for the party in whose favor he found, although the other party did not know this fact, in the absence of evidence to show that it was purposely concealed.—*Goodrich v. Hulbert*, 123 Mass. 190.

Assault.—The prisoner pointed a pistol at a man who unlawfully attempted to stop the team which he was driving, and threatened to shoot if he was not allowed to pass. *Held*, that he might be convicted of a simple assault, but not of an assault with intent to kill.—*Hairston v. The State*, 54 Miss. 689.

Assumpsit.—One who has paid to a bona fide holder for value a note purporting to be made by him and indorsed by the payee, and afterwards discovers either the payee's name or his own to be a forgery, may, if guilty of no laches, recover back from the holder the money paid.—*Carpenter v. Northborough Nat'l Bank*, 123 Mass. 66; *Welch v. Goodwin*, lb. 71.

Bankruptcy.—One partner in a firm became bankrupt. He did not show that he was a member of any firm, or set forth any assets or liabilities of any firm. *Held*, that his discharge in bankruptcy was no bar to an action against him to recover a partnership debt.—*Corey v. Perry*, 67 Me. 140.

Bills and Notes.—A promissory note containing a promise to pay a "collection fee, if not paid when due," *held*, not negotiable.—*Woods v. North*, 84 Penn. St. 407. Contra, *Seaton v. Scovill*, 18 Kans. 433.

Bond.—S. was Treasurer of the State from January, 1873, to September, 1875. In April, 1875, he gave a new bond, with new sureties. He was then a defaulter to the State. After that time, he received public moneys; part of which he applied to discharge his prior defalcation, and part he failed to account for. In an action on the new bond, *held*, that his sureties were liable for the whole.—*State v. Sooy*, 10 Vroom, 539.

Burglary.—Information having been given to the owners of a banking-house that the prisoner intended to rob it, they employed detectives,

who, with the owners' consent, pretending to be accomplices of the prisoner, decoyed him into entering the bank, and having entered he was arrested. *Held*, that he was not guilty of burglary.—*Speiden v. The State*, 3 Tex. Ct. App. 156.

Charity.—Property was given by will to the magistrates and town council of Dumfries, in Scotland, in trust, to apply the proceeds in such manner as might seem best to them, to promote the cause of instruction in the high school of that town. After the will was made, and before the testator died, the control of the school and its trust-funds was by act of Parliament taken away from the magistrates and town council, and vested in a school-board. *Held*, that the latter could not take the devise; the courts of Maryland having no power to execute trusts *cy-pres*.—*Provost of Dumfries v. Abercrombie*, 46 Md. 172.

Check.—At the time of making a check, it was verbally agreed between the drawer and the payee that it should not be presented for payment until a certain time. It was then presented, and dishonoured, of which the drawer had notice. In an action against him by the payee, *held*, that he was liable.—*Pollard v. Bowen*, 57 Ind. 232.

Conflict of Laws.—An infant was, by decree of a court in the State of his domicile, made according to the law of that State, relieved of the disability of nonage. *Held*, that the decree had no extra-territorial force, and did not enable the infant to sue in another State his guardian there appointed and residing, for moneys in his hands as such guardian.—*Gilbreath v. Bunce*, 65 Mo. 349.

Consideration.—1. A wife separated from her husband, and sued for a divorce on the ground of cruelty. *Held*, that her promise to abandon the suit and return to him was a sufficient consideration for his promissory note made to a third person for her benefit.—*Phillips v. Meyers*, 82 Ill. 67.

2. Plaintiffs, in consideration of a royalty, granted to defendants a license to use their patent, the validity of which was in litigation at the time, as defendants knew. In an action to recover the royalty, *held*, that defendants could not set up the invalidity of the patent as

a failure of consideration.—*Jones v. Burnham*, 67 Me. 93.

Conspiracy.—Two persons were indicted for conspiracy. Before verdict a *nol. pros.* was entered as to one. *Held*, that no judgment could be rendered on a verdict of guilty afterwards found against the other.—*State v. Jackson*, 7 S. C. 283.

Constitutional Law.—A statute making the intermarriage of white persons and negroes a criminal offence, *held* constitutional.—*Frasher The State*, 3 Tex. Ct. App. 263.

Constitutional Law (State).—1. The legislature authorized a city to exempt from taxation for six years the property of a water company. The company contracted to supply the city with water for public purposes, free of cost; and the city exempted the company from taxation for five years. *Held*, that the statute giving the city power to exempt was constitutional; (2) that the power was well exercised.—*Portland v. Portland Water Co.*, 67 Me. 135.

2. A prisoner convicted of assault and battery was sentenced to five years' imprisonment in the county jail, and to find sureties for \$500 to keep the peace for five years more. *Held*, that the sentence was unconstitutional, because excessive.—*State v. Driver*, 78 N. C. 423.

3. A constitutional amendment provided that "property shall be assessed for taxes under general laws, and by uniform rules." When this amendment was adopted, there was a general tax-law in force. *Held*, that the amendment was self-executing, without further legislation, and repealed all special tax laws.—*State v. Newark*, 10 Vroom, 380.

Contract.—A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Afterwards B. bought C.'s business, and delivered ice to A., who had no notice of the purchase until after the ice had been delivered and used. *Held*, that B. could not recover the price of the ice from A.—*Boston Ice Co. v. Potter*, 123 Mass. 28.

Corporation.—1. A man purchased land, with actual notice of an unrecorded incumbrance on it. Afterwards a corporation was organized, of which he was chosen an officer, and to which he conveyed the land. *Held*, that the corporation, having no actual notice of the incumbrance,

was not affected with constructive notice.—*Wickersham v. Chicago Zinc Co.*, 18 Kans. 48.

2. A certificate of stock in a corporation was delivered to an auctioneer for sale, together with a power of attorney purporting to be executed by the owner. The auctioneer having sold the stock, took out a new certificate in his own name, and assigned it to a purchaser for value, to whom the corporation issued a new certificate. The original certificate had been taken without the true owner's knowledge, and the power of attorney was forged; but this was not known either to the auctioneer or the purchaser. On bill by the true owner against the corporation and the purchaser, *held*, that he was entitled to a decree against the corporation to issue to him a certificate for his shares and to pay to him the dividends thereon; but not to a decree against the purchaser.—*Quare*, as to the rights of the corporation and the purchaser.—*Pratt v. Taunton Copper Co.*, 123 Mass. 110.

Covenant.—A. covenanted to sell to B. a lot of land and banking-house, and further, not to engage within ten years in the business of banking in the same town; and that the covenant should run with the land, and that any person who might own the land might sue on it in case of breach. B. sold the land to C. *Held*, that C. might sue A. for a breach of the covenant.—*Nat'l Bank of Dover v. Segur*, 10 Vroom, 173.

Damages.—1. Trespass for taking coal from plaintiff's mine. *Held*, that the measure of damages was the value of the coal as soon as it was severed and became a chattel; that is, its value at the mouth of the pit, less the cost of getting it there from the place where it was dug.—*Illinois & St. Louis R. R. Co. v. Ogle*, 82 Ill. 627.

2. Money was sent by carrier to the agent of a life-insurance company, to be applied in payment of a premium due on a policy, which would by its terms lapse if such premium was not paid of all which the carrier had notice, but failed to deliver the money. *Held*, in an action against him by the administrator of the assured, that the measure of damages was the value of the policy when it lapsed; unless the deceased might by the use of ordinary care, have obtained other insurance before he died, in which case the carrier would not be liable for the loss which the deceased might thus have prevented.—*Grandis v. Eastern Express Co.*, 67 Me. 317. And see *Sutherland v. Wyer*, ib. 64.

Deceit.—1. In a suit to recover the purchase-money of a plantation on the Mississippi River, *held*, that the vendee might recoup the damages suffered by inundations, which the vendor had fraudulently represented that the plantation was safe from; including the diminished value of the plantation below what was paid for it, by reason of its exposed situation, and also the actual loss of crops, of cattle drowned, and of fences washed away.—*Estell v. Myers*, 54 Miss. 174.

2. Defendant, on the sale of a farm to plaintiff, falsely represented that a certain noxious weed did not grow on it; and defendant bought it, relying on such representations. In fact, the weed grew on the farm; and plaintiff had visited the farm, and gone over it freely, and knew the weed by sight, and might have seen it growing on the farm. *Held*, that he could not maintain an action for deceit. (Three judges dissenting.)—*Long v. Warren*, 68 N. Y. 426.

Deed.—1. Land was conveyed by deed, the boundary "beginning at" a certain tree. *Held*, that the centre of the tree was not necessarily the boundary, but that evidence of an actual occupation on a line beginning at or near one side of the tree was admissible to show the true boundary.—*Stewart v. Patrick*, 68 N. Y. 450.

2. Land bounding on a stream was conveyed, the grantor "reserving the right of occupying the pond and shore for the purpose of securing and holding timber taken from his property." *Held*, that he had the right to pile timber on the land, as well as to moor to the land timber floating in the water.—(Two judges dissenting.)—*Lacy v. Green*, 84 Penn. St. 514.

Devise and Legacy.—1. Devise to A, for life, and, if she have lawful issue, then to said issue in fee; but, should she die without lawful issue, then over. *Held*, (1) that A. took only an estate for life; (2) that the devise over was good as a contingent remainder.—*Timanus v. Dugan*, 46 Md. 402.

3. Devise "to J. S. and family." J. S. had a wife and six children. *Held*, that he and his wife took one-seventh of the estate, as tenants by entireties, and the children each one-seventh. *Hall v. Stephens*, 65 Mo. 670.

3. Testatrix gave a certain sum to each of her two sisters, and in case of the death of either "without natural heirs," the bequest to go to

the survivor.—*Held*, that "natural heirs" meant issue.—*Miller v. Churchill*, 78 N. C. 372.

Divorce.—A malicious prosecution of a husband by his wife, for an alleged assault and battery, *held*, not such cruelty by her as to entitle him to a divorce.—*Small v. Small*, 57 Ind. 568.

Emblements.—Land was conveyed in fee simple, "possession to be given at the death of" the grantor, with a very sweeping clause conveying all rents and profits, privileges and appurtenances, with much particularity, and in the fullest manner. On the grantor's death, *held*, that the grantee, and not the grantor's executor, was entitled to growing crops.—*Waugh v. Waugh*, 84 Penn. St. 350.

Evidence.—1. In a civil action for maliciously burning a building, *held*, that the defendant could not give evidence of general good character.—*Gebhart v. Burkett*, 57 Ind. 378.

2. In an action by a father to recover for the services of his son, on a *quantum meruit*, the defendant may show that the son embezzled an amount exceeding all wages due him, so that his services were worth nothing.—*Schoenbergh v. Voight*, 36 Mich. 310.

3. In an action by the superintendent of a manufacturing company, against the company, to recover his salary, he gave in evidence the certificate of the treasurer of the company that so much was due him. *Held*, that the certificate was not binding on the company as an admission, without proof that the treasurer had authority to make it. *Kalamazoo Manuf. Co. v. McAlister*, 36 Mich. 327.

4. A bill of exceptions, agreed to by the counsel on both sides and allowed by the judge, containing the substance only of the testimony of a witness in a capital case, *held* admissible in evidence on a second trial of the case, the witness having died meantime.—*State v. Able*, 65 Mo. 357.

5. Assessments of taxes *held*, not admissible to show the value of land.—*Hanover Water Co. v. Ashland Iron Co.*, 84 Penn. St. 279.

6. Defendant sold goods by sample to plaintiffs, who sold them by the same sample to a third person, who afterwards sued plaintiffs for breach of an implied warranty of quality, and recovered judgment, which plaintiffs satisfied. In an action by plain-

tiffs against defendant to recover over for breach of warranty, *held*, that the judgment against plaintiffs was not evidence of a breach, though defendant had notice of the action in which that judgment was rendered, and was requested to defend it, and testified as a witness in it.—*Smith v. Moore*, 7 S. C. 209.

7. Action by a city against a land-owner, to recover the expense of abating a nuisance on his land. *Held*, that the decision of the city board of health, made without notice to the owner, that a nuisance existed on the land, was not conclusive evidence (and, *semble*, that it was not evidence at all) that such nuisance in fact existed.—*Hutton v. Camden*, 10 Vroom, 122.

8.—Action on a policy of fire insurance. Plea, that the assured wilfully burned the property. *Held*, that defendants were not bound to prove the plea beyond a reasonable doubt.—*Kane v. Hibernia Insurance Co.*, 10 Vroom, 697 (Court of Errors, reversing judgment of Supreme Court).

Execution.—After an execution had been levied on slaves, but before they were sold under it, they were emancipated. *Held*, that the judgment was satisfied.—*McElwee v. Jeffreys*, 7 S. C. 228.

Executor and Administrator.—1. Bill in equity by residuary legatees, against the sureties on the executor's bond, to recover for a *devastavit* committed by the executor. *Held*, not sustainable, the remedy being at law on the bond.—*Edes v. Garey*, 46 Md. 24.

2. Assumpsit against administrators. Plea, *pais darrein continuance*, that they had been removed from office and a new administrator appointed. Replication, that before removal they were guilty of a *devastavit*. *Held*, bad.—*McDonald v. O'Connell*, 10 Vroom, 317.

Foreign Attachment.—1. One summoned as garnishee disclosed that he had given to the defendant a certificate of indebtedness, not negotiable, but which the defendant had sold to a third person. *Held*, that he was not chargeable. *Cairo & St Louis R. R. Co. v. Killenberg*, 82 Ill. 295.

2. A railroad company mortgaged all its property now possessed or hereafter to be acquired; and afterwards, while remaining in possession of the road, made a contract to carry freight for an express company. *Held*, that the express company was chargeable, as garnishee of the railroad company, for all moneys earned by the latter under the contract before the mortgagees

took possession.—*Emerson v. European & North American Ry. Co.*, 67 Me. 387.

3. The State treasurer cannot be held as garnishee, in respect of moneys in his hands due from the State to the debtor.—*Lodor v. Baker*, 10 Vroom, 49.

Fraudulent Conveyance.—By statute, a judgment is a lien for seven years on the judgment debtor's land. A creditor having suffered seven years to elapse after recovering judgment, *held*, that equity would not afterwards aid him to set aside a fraudulent conveyance of the debtor's land.—*Fleming v. Grafton*, 54 Miss. 79.

Gaming.—Persons who play together at an unlawful game are several and not joint offenders, and therefore they are not accomplices of each other, and one may be convicted on the uncorroborated evidence of another.—*Stone v. The State*, 3 Tex. Ct. App. 675.

Homicide.—By the law of Massachusetts, suicide is criminal as *malum in se*, though neither the act nor the attempt to commit it is punishable; and therefore where a person in attempting to commit it, accidentally killed another who was trying to prevent its accomplishment, *held*, that he was guilty of manslaughter at the least; whether of murder, *quære*.—*Commonwealth v. Mink*, 123 Mass. 422.

Husband and Wife.—1. Action against husband and wife for the tort of the wife. Verdict, that the wife is guilty. *Held*, that judgment should be rendered against both.—*Ferguson v. Brooks*, 67 Me. 251.

2. A wife cannot, after a divorce, maintain an action against her husband for assaulting and falsely imprisoning her as a lunatic, during coverture; nor against third persons who conspired with him and assisted him therein.—*Abbott v. Abbott*, 67 Me. 304.

3. An execution was levied on land of which the debtor and his wife were seized by entireties. *Held*, that the levy was valid, and passed to the creditor the debtor's estate during his life; but did not divest the wife's right of survivorship.—*Hall v. Stephens*, 65 Mo. 670.

Insanity.—On an issue of the sanity of a testator, the jury were instructed that illusions or hallucinations, though evidence of insanity, would not avoid the will, unless such delusion or insanity had entered into or affected the will itself. *Held*, error.—*Eggers v. Eggers*, 57 Ind. 461.

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ENGLISH BANKRUPTCY CASES.

Creditors in England do not seem to be much more fortunate than those in a similar position elsewhere. A correspondent communicates to *Truth*, an English journal, a printed list of the results of twenty-four bankruptcies, which, he says, "are in no way exceptional." If not exceptional, they are nevertheless not a little remarkable. Altogether the estates in these cases realized £56,917 10s. 9d. Out of this the "trustees" managed to appropriate £15,586 17s. 4½d; £11,415 3s. 3d. went to the creditors, while £2,763 10s. 2d. represented the balance, probably never to be distributed, remaining in the hands of the trustees at the time of the last audit. "The facts of one of the twenty-four cases," says the writer, "are peculiarly instructive. In it the committee of inspection was a firm of London solicitors, the trustee an accountant having offices in the same building, and the only assets were sold by an auctioneer, whose charges for so doing were £90 3s. 1d. The sale realized £599 15s. 7d., which was thus divided: The committee of inspection voted the solicitors of the trustee (themselves, doubtless) £173 2s. 5d., and awarded the trustees £172 17s. 9d.; but the creditors did not get a single farthing, the rest of the funds being pocketed for incidental expenses. In another case the trustee was a solicitor and the registrar of a county court, and knowing that his official position prevented him charging extravagantly, he did next to nothing and took £39 17s. 6d. for his services; but he so managed that his solicitor's costs amounted to £1293 18s. 7d. The creditors only got £839 8s. 9d. between them."

STENOGRAPHERS' FEES.

An order has been made by the Superior Court at Montreal, fixing the rate to be allowed in future to stenographers taking notes of evidence in the Court, at twenty cents per hun-

dred words, and the prothonotary has been instructed not to employ any who do not consent to accept this rate. It is hardly within our province to discuss the question of fees here. It may be observed, however, that the duty of taking a correct note of evidence is a responsible and onerous one, and the work, if stenographers were paid by a salary, ought at least to be as well remunerated as that of a deputy prothonotary. It is obvious, where accuracy is essential, that incompetent or careless writers ought to be excluded, and that the scale of remuneration should be sufficient to secure the best men. We have some doubt whether the new rule will do this. For instance, stenographers engaged by Parliamentary committees, are paid thirty cents per hundred words, and five dollars additional for attendance at each sitting of a committee—in some instances, ten dollars a day for a morning and afternoon sitting. Even at these rates it has been found difficult at times to secure a sufficient number of competent writers. It is also a fact that the *Hansard* contractors, themselves short hand writers and fully acquainted with the value of the work, find it necessary to offer from three to four hundred dollars per month for competent assistants. While the employment of stenographers under the present system, in consequence of the needless redundancy of evidence, involves enormous charges on suitors, it is extremely problematical, in view of the above facts, whether the system will give greater satisfaction when the fees are cut down to a point which may lead competent stenographers to betake themselves elsewhere.

THE INNS OF COURT.

Around these famous edifices are gathered associations which possess more than mere professional interest. In a learned Inn, wrote Thackeray, "men are contented to sleep in dingy closets, and to pay for sitting-room and the cupboard, which is their dormitory, the price of a good villa and garden in the suburbs, or of a roomy house in the neglected square of the town. Nevertheless those venerable Inns which have the lamb and flag and the winged horse for their signs, have attraction for the persons who inhabit them, and a share of rough comfort and freedom, which men always rem-

ember with pleasure. I don't know whether the student of law permits himself the refreshment of enthusiasm, or indulges in poetical reminiscences as he passes by historical chambers and says, 'Yonder Eldon lived—upon this side Coke mused upon Littleton—here Chitty toiled—here Barnwall and Alderson joined in their famous labors—here Byles composed his great work upon Bills, and Smith compiled his immortal Leading Cases—here Gustavus still toils, with Solomon to aid him'; but the man of letters can't but love the place which has been inhabited by so many of his brethren, or peopled by their creations as real to us at this day as the authors whose children they were—and Sir Roger de Coverly walking in the Temple Garden, and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with the Scotch gentleman at his heels on their way to Dr. Goldsmith's Chambers in Brick Court; or Henry Fielding, with inked ruffles, and a wet towel round his head, dashing off articles at midnight for the Covent Garden Journal, while the printer's boy is asleep in the passage."

Judge Dillon, an intelligent observer from this side of the Atlantic, not long ago spent several weeks in and about these Inns and Westminster Hall, and in a very able address recently delivered before a bar association, gave the result of his observations. The subject, we believe, possesses sufficient interest to justify us in presenting our readers with the Judge's paper in a somewhat abridged form.

JUDICIAL APPOINTMENTS IN ONTARIO.

The death of Chief Justice Harrison of the Court of Queen's Bench has led to the following changes and appointments. Chief Justice Hagarty, of the Court of Common Pleas, takes the Chief Justiceship of the Queen's Bench, and becomes Chief Justice of Ontario. Mr. Justice Adam Wilson is appointed to the Chief Justiceship of the Common Pleas, and the Hon. M. C. Cameron, who has held the position of leader of the opposition in the Local House, is appointed to the Queen's Bench in the stead of

Mr. Justice Wilson. These are appointments which commend themselves at once to the legal profession and the public. The reputation of Chief Justice Hagarty is thoroughly established; Chief Justice Wilson is also known as an able judge; and the Hon. Mr. Cameron has been long distinguished at the bar for keen intellect and sound judgment.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Nov. 4, 1878.

TORRANCE, J.

SYMES *et vir*, v. VOLIGNY.

Dilatory Exception—Costs.

Held, that the costs on dilatory exceptions calling for power of attorney from the plaintiff, and for security for costs, must abide the final judgment in the cause.

TORRANCE, J., remarked that the settled practice of the Court in such cases is that the costs shall abide the final judgment.

Bethune & Bethune for plaintiffs.

A. Desjardins for defendant.

COURT OF QUEEN'S BENCH.

(CROWN SIDE.)

Montreal, October 31, 1878.

Present: RAMSAY, J.

THE QUEEN v. FORGET *et al.*

Elections Act—Prosecution for offence—Irrregularity.

1. Sect. 114 applies to an accusation for an offence under sect. 68 of the Elections Act, Canada.

2. The failure of the returning officer to take the oath prescribed in such cases will not defeat a prosecution under the Act, the failure of the officer to be sworn not having the effect of annulling the election.

3. A return signed by the election clerk as returning officer is good, where it appeared that the Returning officer had declared himself unable to act, and had been represented throughout the election by the clerk.

The prosecution was against Forget and five others, for an offence under the Dominion Elections Act, commonly called "ballot stuffing."

The indictment against the defendants contained three counts. The first accused them of unlawfully putting into the ballot box in use at poll No. 2, Ste. Anne Bout de l'Isle, thirty-four false and forged ballot papers; the second count charged them with taking out of the same ballot box, at the same election, thirty-four ballots which had been properly put into the box by the electors on the occasion of that election; and the third count charged them with opening without due authority the ballot box at that election. The offences charged are the offences created by section 68 of the Electoral Act of 1874; and are misdemeanors subjecting the parties, should one of them be returning officer, deputy returning officer, or other officer engaged at the election, to a fine not exceeding \$1,000, or, in default, imprisonment with or without hard labor, for any term less than two years, and if any other person, to a fine not exceeding \$500, or, in default, imprisonment for not over six months, with or without hard labor.

RANSAY, J. The case for the prosecution being closed, it was suggested that there was no case to go to the jury, inasmuch as there was no proof to show that an election had taken place. It was argued firstly, that section 114 of the Dominion Elections Act, did not apply to the indictment now before this Court, but only to corrupt practices, and that the acts complained of were not corrupt practices, which were defined by section 98. It was further said, that if section 114 did apply to the offences under section 68, there should have been a certificate of the returning officer to show the due holding of the election. It was argued, secondly, that the whole return had been produced, and that it did not appear that Mr. Valois had been sworn, and that there were two oaths signed by Mr. Forget, but that the jurats were in blank, and that this omission was in no way covered. It was argued thirdly, that the return was by Mr. Olivier, signing as returning officer, and who had acted since the 12th September, when Mr. Valois had declared himself unable to act, while the nomination of Mr. Forget was made by Mr. Valois who had ceased to be returning officer. It was said, either Mr. Forget was not duly authorised to act, or the return was bad.

For the prosecution it was contended that

section 115 dispensed with the necessity of producing the writ of the election, or the return thereof, or the authority of the returning officer, but allowed general evidence of such facts. It was further said that section 2 allowed the Clerk of the returning officer to act instead of the returning officer, and that by his oath (form D) he swore to act faithfully in his capacity of returning officer if required to act as such, and that in any case irregularity occurring in the return could be no answer to an offence under the act.

The defence replied that the return made proof that there was no valid election.

With regard to the first point I think that an accusation under 68 is covered by section 114. Section 98 is not a definition of corrupt practices. It only enumerates certain offences, which shall be corrupt practices, and which are not so classed by their nature. But in any case, section 115 gets over the difficulty, for it applies to any suit or prosecution under this Act, and it allows general evidence to establish that an election was held, and the authority of the returning officer, without producing the writ on which that authority was founded, and the return. With regard to the second point to succeed, it would have been necessary for the defence to show that the failure of the returning officer to be sworn, or to swear one of his deputies, annulled the election. I don't believe any authority for such a proposition can be found. Were it otherwise, by neglecting a private act, of which the public has no means of knowing anything, it would be possible for the returning officer to destroy the effect of any election. I am clearly of opinion that the authority of the returning officer is founded on the writ and not on the oath, and that his not taking the oath has no other effect than to lay him open to the penalty of section 108. The case of *Rex v. Vaile* (6 Cox, page 470) only says that at common law the writ must be produced to show that an election was duly held. It has, therefore, no bearing upon this case. The general rule is not that elections are declared null because a statute has not been strictly followed. They are only nullified if there is reason to believe that the irregularity has affected or probably affected the result. But further than this, I don't think that the annulling of the election for lack of formality

would absolve those who had acted in violation of the law unless the election were radically null.

With regard to the third point, even if it were admitted, for the sake of argument, that the signature of Mr. Olivier, as returning officer, was a bad return, I do not see how it could affect the wrong doing during the election, more particularly as the fact of the election may be proved by general evidence. But on a close examination of the statute I think Mr. Olivier was right in continuing to consider Mr. Valois returning officer all through the election. I also think he was right in performing all the duties of the returning officer when he was disqualified or unable to perform them himself, or when he refused to perform them. Therefore the nomination of Mr. Forget by Mr. Valois was not unlawful, and the only question that remains is as to whether Mr. Olivier had a right to take the quality of returning officer. In face of the form of the oath it is impossible to say that he had not that "capacity," but probably a return taking the quality of "election clerk" or "election clerk" acting instead of the returning officer, would also be sufficient.

I am, therefore, of the opinion that the case must go the jury.

Kerr, Q. C. and Chapleau, Q. C. for the prosecution.

Carter, Q. C., Geoffrion and St. Pierre for the defendants.

Montreal, Nov. 8, 1878.

THE SAME V. THE SAME.

Indictment—Demurrer—Amendment.

1. The omission of a substantive averment in the indictment for an offence under the Elections Act, that an election was held, though a defect, is such as must be objected to by demurrer or motion to quash.

2. A count alleging that each of several defendants put illegal ballots in the box, which "the said deputy returning officer (one of them) had not a right to put in," is bad, as lacking precision.

The defendants, Forget, Pilon, Lamarche and Christin, in the above case, having been found guilty, *Carter, Q. C.*, made the following motion:

Motion on the part of Adelard P. Forget, Isale Pilon, Adolphe Lamarche and Adolphe Christin, defendants upon the said indictment,

that the judgment of this honorable Court upon the verdict of guilty rendered against them upon the trial of said indictment, be arrested for the following amongst other reasons:—

1st. Because the said indictment is wholly illegal, informal and insufficient to sustain the said verdict or to warrant the conviction of said defendants, inasmuch as said indictment does not allege, by introductory averment or otherwise, the issuing of a writ of election for the purpose of electing a member of the House of Commons of Canada for the electoral district of Jacques Cartier, nor does it allege that an election was duly holden for the purpose aforesaid, but merely in the description of Adelard P. Forget, one of the said defendants, describes him as being deputy returning officer at a certain poll for the purpose of the election, then being held of a member of the House of Commons of Canada for the electoral district of Jacques Cartier.

2nd. Because in the first count of the said indictment, the offences therein referred to could apply only to persons having authority to put ballot papers into the ballot box, and the indictment does not allege that any of the defendants aforesaid had any such authority, nor does the said indictment allege that they were deputy returning officers acting at an election duly holden for the purpose aforesaid.

3rd. Because it is not alleged in the first count of the indictment that the papers alleged to have been put into the ballot box purported to be ballot papers containing the votes of electors, and by reason of such omission the first count fails to set forth with certainty and precision, in legal terms, the offence.

4th. Because the second count of the indictment does not allege that the ballot papers fraudulently and unlawfully destroyed as therein and thereby alleged, were ballot papers containing votes of electors.

5th. Because the said Adelard P. Forget is alleged in the third count of the said indictment to have been Deputy Returning Officer, and by law, as such Deputy Returning Officer, he had authority to open the ballot-box, and there are no special circumstances set forth in the said indictment to show that the alleged opening of the said ballot-box was fraudulent, unlawful, and without due authority.

6th. Because it is not alleged in any of the

counts of the said indictment that the ballot-box therein referred to was the property of Her Majesty, or that it was a ballot box legally provided for the purpose of the election therein referred to.

7th. Because the said indictment and the several counts thereof are illegal, informal, insufficient and do not disclose or set forth with precision and certainty any crime or offence.

RAMSAY, J. (Nov. 8). A motion in arrest of judgment raising several objections to the indictment was made to this Court yesterday morning. All but two of these objections were disposed of at the argument, and I have to deal with the remaining two. The first objection was that there was no substantive allegation in the indictment that an election had been duly held; and that the fact was only averred in a narrative form. This is certainly a defect in the indictment, and one which formerly would have been fatal to the whole proceedings, but now we have the 32nd section of the Criminal Procedure Act, which is in these words:—

Every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and every court before which any such objection is taken, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defects had appeared: and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

Now this is plainly a defect on the face of the indictment which might have been raised by demurrer or motion to quash. This has not been done, and I am positively prohibited by the section of the statute just cited to entertain a motion to quash. Of course if the indictment were wholly bad I might, on the suggestion of the motion, reserve the point. But no reservation would be of any use, for the defect is evidently amendable. Nothing can be more formal than this objection. It amounts to this, that common law requires all the allegations of the indictment to be in the present tense and not to be set forth in the present participle. Grammatically there is no reason for this. A fact is as explicitly set forth in the one way as in the other. If one says:

"Walking in the street I met A" he asserts the fact as completely as if he said "I walked in the street and while I so walked I met A." Nevertheless as the practice is to require the latter form I should have held the indictment bad if the objection had been taken at the proper time; but I should have allowed it to be amended as it is precisely a defect that could not have affected the defendants injuriously, and that is the real test of what is amendable. I therefore think the conviction is good. The other point only affects the first count of the indictment. The subsection under which it is drawn is thus worded:—

"No person shall . . . fraudulently put into any ballot-box any paper other than the ballot paper, which he is authorized by law to put in."

Mr. Carter argued that this offence can only be committed by an officer, because he only is authorized to put in a ballot paper. I cannot go so far. I think any one can commit the offence, and so the law says. The only difference is that an officer may have an excuse for putting in a ballot paper; no other person can have such excuse. But there is still a difficulty. The indictment says that each of these persons did put in ballot papers, which the said deputy returning officer (one of them) had not a right to put in. This lacks the precision required in criminal pleading, and I must therefore hold the count to be bad.

Kerr, Q. C., said it might be good for Forget.

RAMSAY, J. I can't take back the judgment. This distinction was not raised, and it is of no importance, as the judgment will go on the two other counts.

The Judge then addressed Mr. Forget as the principal offender. He was an official, and bound to protect the integrity of the election. He had joined really in a conspiracy to defeat it. The prosecution should not have been charged with persecution, for the very lightest charge had been framed. If there had been an indictment for conspiracy it might have embraced others, perhaps, more guilty than those convicted. If such a charge had been proved, he would have sent them all to goal. But the Court had to deal with the case before it, and with the inconvenient form of penalty by fine. A fine of \$1,000 might be nothing to one man and ruin to another. The Court had no opportunity of judging of the means of the

defendants, and it would, therefore, impose fines which might appear to many too light, and, perhaps, to a few too heavy. The Court had, however, fixed the fine on Mr. Forget at \$200, and in default of payment three months' imprisonment without hard labor. On Mr. Christin, a fine of \$100, or a similar imprisonment for 55 days. On Lamarche, a similar fine, or imprisonment; and on Pilon—as he was recommended to the mercy of the Court—only \$50, or a similar imprisonment of 30 days. In conclusion, the Court remarked that, if it had not appeared that Mr. Forget was not sworn, the full fine would have been imposed on him; but the not taking of the oath showed that, although prepared to commit an electoral fraud, he was not prepared to add to this offence the crime of perjury.

COURT OF REVIEW.

Montreal, Oct. 31, 1878.

MACKAY, TORRANCE, JETTÉ, JJ.

[From S. C. Montreal.

SAUVÉ v. SAUVÉ et al.

Sale of Succession — Registration — Signification.

A deed of sale or cession of *droits de succession* duly unregistered, does not require signification. An *acte sous seing privé* subsequently passed between the parties, purporting to annul and set aside the deed of cession, but which *acte sous seing privé* has been neither registered nor signified, does not give the *cédant* a right of action.

The defendants inscribed in review from the judgment noted *ante*, p. 387, contending that the deed of cession was really a sale, and being duly registered, did not require signification. The Court of Review reversed the judgment, the *considérants* being as follows:

"The Court, etc.,

"Considering the judgment *a quo* erroneous in holding unfounded the defendants' exception founded on the plaintiff's cession referred to in it, and in holding signification to have been required of the said deed of cession;

"Considering the character of the deed of cession referred to, the Court here holds that it, registered as it was, did not require signification, as in cases of *simples transports* signification used to be required, and is still required;

"Considering Art. 1225 of the Civil Code, this Court holds that the private writing purporting to annul the deed of cession referred to, the said writing unregistered, and not in any way known to the defendants till long after they had pleaded to this action, ought not to have had weight given to it to destroy defendants' exception;

"Doth, revising said judgment, cass and reverse the same, etc."

St. Pierre & Scallon for plaintiff.

Doutre & Co. for defendants.

THE INNS OF COURT AND WESTMINSTER HALL.

The Inns of Court and Westminster Hall are the well-springs and fountains of English, and derivatively of American, Jurisprudence. Neither the history of the English nation, nor the special history of the English law, can ever fail to be of surpassing interest to the statesmen, the legislators, the judges, the lawyers and the people of this country. In a general view, the history of England "during the last six centuries, is the history of the progress of a great people towards liberty"; and *Magna Charta* and the Petition and Bill of Rights are the basis and palladium of American, as well as English, liberty.

There are now, and for centuries have been, four great Inns of Court; Lincoln's Inn, Gray's Inn, the Inner Temple, and the Middle Temple. With these are, or have been, connected about ten smaller Inns, known as the Inns of Chancery, subordinate to, and under the government of, the particular Inn of Court to which they severally belong.

The Inns of Court, including under the general name the dependent Inns of Chancery, are amongst the most remarkable antiquities of London. They are interesting to all, but profoundly so to the English and American lawyer.

The legal antiquary can not fix upon the exact time of the origin and foundation of these Inns, but the period of their original establishment can be nearly approximated.* They

* "The original institution of the Inns of Court nowhere precisely appears. * * They are voluntary societies which have for ages submitted to government analogous to that of the seminaries of learning."—*Lord Mansfield in Hart's case*, 1 Douglas, 353.

carry the mind back to the depths of the Middle Ages. They antedate the discovery and settlement of this country. They touch upon the borders of *Magna Charta* and the Crusades. King John lodged at the new Temple previously to signing the *Magna Charta*, and pending the negotiation with his barons which had its glorious issue at Runnemedes (A. D. 1215). The Temple society of lawyers afterward inherited the name, and, what was more important to it, succeeded to the property of the Knights Templars, which it still continues to own.

In the quaint and curious edifices known as the Inns of Court, the lawyers and judges of England have been trained and educated for centuries. Changes, replacements and additions have been made in the buildings from time to time, and the present structures, as a whole, notwithstanding the admiration with which they are regarded by their members, offer to the eye no imposing presence, and no striking architectural beauty: quite the reverse. The interest is historical and intellectual. The chambers are dismal and dingy, but they are associated with the lives and names of great sages in the law who have conferred glory and renown upon our profession, and advanced our law to its present height and proportions.

More than six centuries have elapsed since the Inns of Court were founded, and Westminster Hall was at that time more than a century old. What educated or thoughtful lawyer can survey them with indifference?

Dr. Johnson in a familiar passage respecting famous places, finely observes "that to abstract the mind from all *local emotion* would be impossible, if it were endeavoured, and would be foolish, if it were possible. Whatever withdraws us from the power of our senses—whatever makes the past, the distant or the future, predominate over the present, advances us in the dignity of thinking beings. Far from me, and from my friends, be such frigid philosophy, as may conduct us unmoved, over any ground which has been dignified by wisdom, bravery, or virtue. That man is little to be envied, whose patriotism would not gain force upon the plain of Marathon, or whose piety would not grow warmer among the ruins of Iona."

As little to be envied is the lawyer whose enthusiasm and love for his noble profession are not quickened into new life by the view and

contemplation of these venerable Inns and this illustrious Hall.

The Inns of Court were originally provided for the use and accommodation of lawyers and students at law, and they have maintained that character to the present time. By a clause in *Magna Charta*, dated June 15, A. D. 1215, it was ordained, to redress the grievance of compelling suitors to attend the sovereign wherever he might chance to be, that the Court of "Common Pleas should not thenceforth follow the Court [the King,] but be held in some certain place." This certain place was established in Westminster Hall, which then distinctively became, and has since remained, the principal seat of the Judicial Courts. The fixed location of this important court, called by Sir Edward Coke, "the lock and key of the common law," had another consequence. It drew the lawyers together from all parts of the kingdom and formed them into one body, who to the great advantage of the law henceforth gave themselves wholly to its study and practice. Such was the origin of the Inns of Court.

The Inns with their adjacent gardens are now in the heart of London. All is quiet within the close, but the swelling tide of life and business rolls tumultuously along the adjacent strand and on the bordering Thames. But when the sites of the Inns were chosen they were in the suburbs between the place where the King's Courts were held at Westminster and the city of London; thus enabling the members conveniently to attend the one and draw their supplies of provisions from the other.*

*1 Blacks.Com., 23. Sir John Fortescue (*De Laudibus Legum Angliæ*) more than four hundred years ago, thus sets forth the reasons for the location of the Inns. The sites of the Inns were chosen, not "within the city where the confluence of people might disturb the quietness of the students, but somewhat several in the suburbs of the same city, and nigher to the King's Courts, that the students may daily at their pleasure have access and recourse without weariness." "For this place of study is situate nie to the King's Court, where the same laws are pleaded and argued, and judgments on the same given by judges, men of gravity, ancient in years, perfect and graduate in the same laws: wherefore every day in court the students in those laws resort by great numbers into those Courts, wherein the same laws are read and taught, as it were in common schools." The river Fleet—whence the celebrated street and prison of that name—flowing past the foot of Holborn Hill, separated the Inns of Court from the city.

The Inner and Middle Temple were located on the Thames, and near three hundred years ago were alluded to in the "Fairie Queene" as

—"Those bricky towers

The which on Themmes brode aged back doe ride,
Where now the studious lawyers have their bowers;
There whilom wont the Templar Knights to bide,
Till they decayed through pride."

Standing to-day in the gardens of the Temple the eye takes in the Thames and its bridges, and stretches from Lambeth Palace and Westminster Abbey on the west to the cathedral of St. Paul on the east. Gray's Inn, near by, is on higher ground, and while it lacked a view of the Thames it was originally compensated by its fine prospect of the Hills of Hampstead and Highgate.

Lincoln's Inn and Fields, in the same neighborhood, are also finely situated, and the gardens of the Temple and of Gray's and Lincoln's Inn and the ground known as Lincoln's Inn Fields, (which it has required the highest exertion of the royal power to prevent being encroached upon by the advancing tides of population), are among the most attractive portions of the great Metropolis. Lord Bacon belonged to Gray's Inn, and he so enjoyed the quiet of its gardens and prospect it afforded that he built therein a summer house for study and contemplation.* The records of the Society show that "the summe of £7 15s 4d laid out for planting Elm trees" in these gardens was also allowed to Mr. Bacon; and his Essays, the most delightful of all his writings, are dated from "his Chamber in "Graie's Inn." The trees which Bacon planted in the gardens of the Inn he loved so well, grew with his rise and lofty advancement, survived his inglorious, though possibly unjust, fall, and while they yet live to delight the beholder, such is the indestructible nature of the works of genius that his fame which he confidently committed to an indulgent posterity, will long outlive the Elms he planted and watered and enjoyed. The works of our hands are perishable: only the creations of the intellect have the heritage of immortality. Bacon died leaving a tarnished fame, but Lord William Russell was beheaded in Lincoln's Inn Fields, a martyr to the eternal cause of human liberty, leaving to the world, for all coming time, the legacy of a spotless life and the unfading record of a high and heroic example.

We possess but little accurate and definite information of the Inns of Court and Chancery until the time of Henry VI., (A. D. 1422-1461). Sir John Fortescue was his chancellor, and in his Panegyric on the Laws of England we have a sketch of the Inns as they then existed. This was over four hundred years ago. He describes them as composed of four large Inns having about two hundred students each, and ten lesser Inns called Inns of Chancery, having about one hundred students each, about 1800 in all, and situate in the suburbs of the city. The students were chiefly young men of birth, many of them being attended with servants, and although he mentions that it was costly to live at them he does not give the order or course of instruction or study. More than a century later, in the reign of Queen Elizabeth, A. D. 1558—1603, Lord Coke gives a full account of the Inns of Court at that time, their names, constitution, readings, moots &c., and he describes the Inner Temple, Gray's Inn, Lincoln's Inn and the Middle Temple, as the "four famous and renowned Colleges or houses of Court." "All these" with the Sergeant's Inn and the Inns of Chancery, are, he adds, "not farre distant one from another, and altogether doe make the most famous Universitie for profession of law, onely, or of any one humane science, that is in the world and advanceth itself above all others. In which houses of Court and Chancery, the readings and other exercises of the lawes therein continually used are most excellent and bechoovefull for attaining to the knowledge of these lawes."* I can not enter upon the details of the student's life. He had his chambers or residence in the Inn. The mode of instruction was principally readings and mootings. Minute regulations as to dress and discipline were ordained and attendance on religious services was made compulsory.

In this connection it is proper to remind you that there are *three ranks or degrees* among the members of the Inns of Court. 1. Benchers, or the governing body. 2. Barristers, i. e., persons actually called to the bar. 3. Stu-

* In A. D. 1558, in the various Inns of Court and Chancery, the number of students in term was 1703, and out of term was 642; as appears from a MS. in Lord Burghley's collection.—*Powers*, p. 79.

dents, *i. e.*, members keeping their terms at the Inns with a view to being called to the bar.

The degrees of legal precedence among the members of the bar are these: 1. The highest in rank is the *Queen's Counsel*—the words of appointment in the patent being "one of our council learned in the law." 2. The degree of *Sergeant-at-law*, the most ancient, and formerly the highest, rank at the bar. He is required by the King's writ to take the office, the admission to which was formerly attended with expensive ceremonies, of which only one remains, that of presenting gold rings with mottoes to the Sovereign, the Lord Chancellor, the Judges and others. * I believe that the new Judicature Act provides that no more sergeants shall be created; and Mr. Sergeant Sleight, the one who most recently took the coif, alluding to this, pleasantly said to me, "Behold the last Sergeant, or as you would say in your country, 'I am the last of the Mohicans.'" 3. The *ordinary Barrister-at-law*, or Counselor.

Attorneys, special pleaders, and conveyancers, constitute, as is well known, a distinct branch of the profession, and have no right to practice in the courts. Each of the Inns has numerous buildings of its own, consisting of chambers or rooms let for hire, mainly to the barristers and students; and belonging to each Inn is a large library hall and spacious kitchen, and also a commodious and beautiful hall, used for readings, dining, etc., and a chapel for religious service. The Inner Temple owns and uses for this purpose the exquisite Temple Church built by the Knights Templars, (in imitation of a temple near the Holy sepulchre,) and which was dedicated in A. D., 1185, nearly 700 years ago. In the Chapels and the Temple Church

* In Modern Rep. 9, the following curious circumstance relating to the *rings* given by Sergeants on their call is recorded: "Seventeen Sergeants being made, November 4th, (21 Car., 11), Sergeant Powis, one of the new made Sergeants, coming a day or two after to the King's Bench bar, Chief Justice Keeling told him he had something to say to him, viz; that the rings which he and the rest of his brethren had been given weighed but 18s apiece; whereas, Fortescue says (*De Laudibus*), that the rings given to the Chief Justices and Chief Baron ought to weigh 20s apiece; and that he spoke not this, expecting a recompense, but that it might not be drawn into a precedent, and that the young gentlemen there might take notice of it."

many of the most eloquent and pious of the English divines have exercised their sacred office, among whom may be mentioned as familiar to us the names of Tillotson, Heber, and Warburton.

From the first institution of the Inns down to about the period of the civil disturbances of 1640, the exercise of Readings was the principal mode of legal instruction therein. The Inns were mainly established for this purpose, but provision was made only for instruction in the common law. The instruction so far as given in the Inns was mainly Readings and Mootings. The ancient readings continued only about "three weeks in every Lent and every August of each year," until they fell off in consequence of the excessive and sumptuous practices which will be referred to presently. Mootings were arguments of put cases or doubtful questions in the law, between Benchers and Barristers in the hall of the Inn, in the presence of the students.

The Reader was annually elected by the Benchers from the most eminent or ablest of the Barristers, and the office was considered one of great distinction. The readings consisted of the analysis and exposition of some leading statute, or important section of a statute, in the light of the common law and the adjudged cases. Many of these readings, relating "to the grounds and originals of the law," extending back to the time of Edward VI., are still extant, and the more important of them have been published. We owe to this exercise twenty-three readings on *Fines*, (27 Edw. I., c. 1), by Sir Edward Coke, Reader of the Inner Temple, temp. Elizabeth; a reading on *Sewers*, (23 Henry VIII., c. 5), by Robert Callis, Reader of Gray's Inn A.D., 1622, republished as late as 1824, and known as Callis on Sewers; on the "Statute of Uses," (27 Henry VIII., c. 3), by Sir Francis Bacon, also Reader at Gray's Inn (temp. Elizabeth), and many other readings by such lawyers as Littleton, Dyer, Plowden, Fitzherbert, and Finch. Many of these readings are still regarded with great, and often with authoritative, respect in the court of Westminster Hall.

The original object of the readings and the kindred exercises of mootings was instruction; but in the course of time the readings were attended with expensive entertainments given

to the nobility, judges and gentry of the kingdom; the expenses fell upon the Reader, and often amounted to £1,000 in the course of two or three weeks—a sum equal in value to two or three times that amount in our day. This expensive honor finally caused the disuse of readings. During the period when these sumptuous entertainments were given by the Readers, the Inns of Court were at certain seasons the scene of fantastic plays and masques, and riotous revels, which were likewise conducted on an extravagant scale, and were scarcely consistent with the purpose of the Inns as seminaries of legal learning. These were often attended by the sovereign, the court and the nobility, and reached their height in the reign of Elizabeth. They continued until the rebellion of 1640, but when the spirit of the puritan obtained ascendancy, entertainments of this character were denounced by acts of Parliament, as “the very pompes of the Divell.”*

As legal colleges or universities it would appear that the Inns of Court were chiefly deficient in the want of a general, comprehensive and systematic course of instruction. The course was essentially practical—exclusively and distinctively English. The main purpose was instruction in the common law and its statutable modifications and additions. It must have been contemplated that much the greater part of a legal education should be acquired in other modes than from the brief readings and occasional mootings. Accordingly, the custom of reading in attorney's offices or with a barrister or private tutor has long prevailed in England. It is called by Lord Campbell “the pupilising system,” which is much the same as reading in lawyers' offices in this country, although the pupil is in chambers at one of the Inns of the Court.

The Inns of Court maintained their primary and leading character as mainly intended for legal instruction until the 15th century when they became, as we have said, places of gayety and revelry. Their efficiency

as seminaries of instruction declined, and from the middle of the 17th century the instruction in them was nominal, the real instruction being chiefly conducted in private offices. It is only in our own time that the original function of the Inns, as a place of legal instruction, has been restored. In 1852 the four Inns acting in concert jointly established a uniform system for the legal education of the students, and that end created five professorships, and students were required as a condition of eligibility to be called to the bar, to attend for one year the lectures of two of the readers, or if this were not done to pass a satisfactory public examination.* The readerships are filled by eminent jurists and the prescribed course of instruction is minute and comprehensive. It is gratifying to know that portions of the Commentaries of Chancellor Kent and Mr. Justice Story are among those works which the students are expected to read.

The legal character of the Inns of Court has been clearly ascertained by numerous decisions.† The adjudged cases establish the following points: The Inns are voluntary societies and not corporations; they have no charters, either from the Crown or Parliament. They are self-governed. The courts cannot interfere with the internal management of their affairs. In respect of their acts or orders affecting members they are not subject to the jurisdiction of the Courts of Westminster Hall proceeding according to the common law. They cannot be compelled by *mandamus* or otherwise to admit persons to become students or members of the society with the view of being called to the bar. This rests alone with the society.

* In 1872 an enlarged and amended scheme of legal education was promulgated by the four Inns and is now being carried into execution.

† The principal cases concerning the legal constitution and powers of the Inns of Court and the extent of judicial control over them, are *Boorman's Case*, March Rep.; *Townshend's case*, 2 T. Raymond, 5; *Hakestraw v. Brewer*, Abridg. Cases in Equity, 16; *Hart's case*, (*Rea v. Gray's Inn*), 1 Douglas, 354; *Lord Roselyn v. Jordell*, 4 Campbell, 305; 1 Starkie Rep. 148; *Wooler's case*, 4 Barn. & Cress., 855; *Max v. Harvey*, 13 East., 197. In *Hart's case*, *supra*, the Judges sustained the Benchers of Gray's Inn in refusing to call Mr. Hart to the bar, for the reason, among others, that he had knowingly become security for money borrowed of others to a much greater amount than he was able to answer.

* The Czar of Muscovy, Peter the Great, was present at the Christmas revels in the Temple, 1697-8. The last of the revels in the Inns of Court took place in the Inner Temple Hall, on the elevation of Mr. Talbot to the woolsock, in 1733.”—*Pearce*, p. 128.

When admitted as members the visitatorial power of the judges attaches, and the action of the society in refusing to call a member to the bar, or in expelling him from the society, or in depriving him of his gown, *i.e.*, disbaring him, may be reviewed by the judges on an *appeal*, but no other mode, against the orders complained of.

The power to call members to the bar seems not to be oppressively or illiberally exercised, since it appears that during a period of twenty years only three students had been refused admission to the bar by the Four Inns of Court.

The most important faculty which the Inns exercise is the *exclusive power*, as legal colleges,* to confer the degree of *Barrister-at-law* or *Counselor*, which is an indispensable qualification to practice in the courts of common law. A barrister can be created in no other way than by a call by one of the four Inns of Court. He cannot be created by letters patent, or admitted as with us, by the authority of the court. The Inns of Court are thus independent of royal or executive power, and no person called to the bar is indebted for the station to any authority except the governing body of the Inn of Court to which he belongs. To this cause has been attributed the spirit of independence, which in the history of constitutional liberty, has been so often displayed by the Inns of Court, and which has at all times characterized the members of the bar, in asserting legal rights committed to their advocacy or defence. "Rare Ben Jonson," who it is said assisted his step-father a bricklayer, in erecting, in the reign of Elizabeth, a wall for Lincoln's Inn, dedicated a play† "to the noblest nurseries of humanity and liberty, the Inns of Court."

A person who contemplates a call to the bar is required to be admitted as a student, that is, to become a member of one of the Four Inns, which any person of respectable character and attainments has no difficulty in doing, to dine in the common hall of the Inn a few days in

the course of every term, that he may be seen and known; and if unfit the more readily detected before his final application to be called to the bar; to keep in this manner, ordinarily, twelve terms; and in addition, under regulations before mentioned, the lectures of the readers, or professors, in the Inn, or in lieu of such attendance, satisfactorily to pass a public examination. Having complied with these conditions, the student or member is eligible to be called, and unless some good reason appears, is called to the bar.

From this brief sketch, it will be perceived that the Inns of Court are *sui generis* in their character. Within them are collected the great body of the profession in England. The present membership of the four Inns is about 8,000, of whom 6,000 are barristers, and the rest students. This legal community in all its professional relations is governed by its own officers, laws and usages. The chambers are let to students and barristers. The latter have their offices in them. Unmarried members attended by servants frequently live within them, and at their option take their meals in the dining-hall of the Inn. Each inn has not only its kitchen,* but its chapel; not only a complete library, but

* "In all the Inns of Court and Chancery the important concern of eating and drinking seems to have occupied the most attention; instruction, such as it was, (consisting of public readings or lectures, and the mootings, or arguing of cases) was a secondary object." —*Herbert: Inns of Court*, p. 223.

"Another apartment [of Lincoln's Inn] forming an essential appendage to all collegiate establishments, and without which even the splendid Hall would be only suited for the imaginary feast of the Barmecide. is the kitchen—45 feet square and 20 feet high: and connected with the kitchen are cellars capable of holding upwards of one hundred pipes of wine, and above these, butlers' pantries," etc.—*Spilbury: Lincoln's Inn*, p. 120.

"In term-time Mr. Pen showed a most praiseworthy regularity in performing one part of the law student's course of duty, and eating his dinners in the Hall. Indeed, that Hall of the Upper Temple is a sight not uninteresting, and with the exception of some trifling improvements and anachronisms which have been introduced into the practice there, a man may sit down and fancy that he joins in a meal of the seventeenth century. The bar have their messes, the students their tables apart; the benchers sat on a high table on the raised platform, surrounded by pictures of judges of the law and portraits of royal personages who have honoured its festivities with their presence and patronage."—*Thackeray: Pendennis, Chap. XXIX.*

* Blackstone styles the Inns of Court as our Judicial University (1 Com., 23): and Lord Coke in a passage before quoted, styles them the "four famous and renowned colleges or houses of Court," which "altogether doe make the most famous Universitie for the profession of law, onely, that is in the world, and advanceeth itself above all others."

† "Every Man out of his Humour."

an ample dining-hall and elegant drawing-room, adorned with the busts and portraits of its eminent members. Each member is thus within the eye, and in a degree under the fraternal guardianship, of all the others; and heretofore, however it may be under recent regulations, Benchers, Barristers and Students have participated in the educational, as well as the social, life of the Inn.

Westminster Hall had been built by William Rufus, (A. D. 1087-1100) more than a century before the above-mentioned clause in *Magna Charta* required the court of common pleas to be held "in some certain place." It was originally built as an annex to the King's palace of Westminster, and its earlier uses seem to have been for royal ceremonies and festivities. Probably before *Magna Charta* the "*Aula Regia*" had its principal seat in Westminster Hall; but after *Magna Charta*, and probably in consequence of it, it is certain that Westminster Hall became the seat of the great judicial courts, including, for a long period, the Court of Chancery, after its establishment as a distinct jurisdiction. It has never wholly ceased to be used as the place where the coronation banquets of the English monarchs have been solemnised with the accustomed splendor, and as the place for the trial of peers, and of official personages charged with great crimes and misdemeanors. But its distinctive character has been acquired in consequence of having been for centuries the seat of the great courts of justice of the realm.

Among the most finished pieces of word-painting in the language, is Lord Macaulay's well known reference to the main hall as the place for the trial of the impeachment of Warren Hastings. You recall his words: "The place," he says, "was worthy of such a trial. It was the great hall of William Rufus, the hall which had resounded with acclamations at the inauguration of thirty Kings; the hall which had witnessed the just sentence of Bacon, and the just absolution of Somers; the hall where the eloquence of Stafford had for a moment awed and melted a victorious party inflamed with just resentment; the hall where Charles had confronted the high court of justice with the placid courage which has half redeemed his fame." The great Essayist by his love of dramatic effect, and by his immediate subject which was the trial of the extraordinary man to whose

valor and genius Britain's monarch owes to-day, her title of "Empress of India," and her rule over the 275,000,000 of her Indian subjects, overlooked the less striking, but after all the chief glory of the place, as the source whence English justice for more than six centuries has gone forth in its silent but exhaustless flow, to the "business and bosoms" of men, throughout the entire realm, and whose principles are the rich inheritance of all English speaking people in every part of the globe.

When Westminster Hall is mentioned, the world thinks of it as the seat of the Judicial Courts and the fountain of English Justice. Its permanent glory is derived, not from coronation banquets or the imposing spectacle of an occasional State trial, but because it is indissolubly associated with the history and development of the English law, with the renown of great judges, with the fame of learned lawyers and eloquent advocates.

Peter the Great, visiting Westminster Hall in term time, was struck with the throng of men in wigs and gowns crowding the hall, and upon being informed that they were lawyers, exclaimed, "Lawyers! Why, I have only two in all my dominions, and believe I shall hang one of them the moment I get back." Lawyers and judges belong to a free people, and there was not then, and there is not now, in all the wide and barren expanse of despotism between the Crimea and Siberia, any such monument to the glory of the Russias as Westminster Hall.

GENERAL NOTES.

The oldest judge upon the English bench, Sir Fitzroy Kelly, completed his eighty-second year on Wednesday, October 9.

The mortality returns for England and Wales in the year 1876 record the death of 183 men and 409 women registered as 95 years old and upwards when they died. Fourteen of the men had reached 100 or upwards, and one who died at Mountain Ash, was 106. Forty-three of the women had completed a century of life or more, and one who died at Sedgefield, in Durham, was 108 years old. Their respective ages were:—Four men and twenty-one women, 100 years; two men and seven women, 101; five men and four women, 102; two men and three women, 103; two women, 104; three women, 105; one man and two women, 106; and one woman, 108. Six of the persons, one male and five females, who had reached 100 or upwards, died in the London districts.

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SECURITY FROM INSOLVENTS.

Three decisions have been recently given which throw light on the latter part of Section 39 of the Insolvent Act. This section gives the assignee the exclusive right to sue for the recovery of all debts due to the insolvent, and to take, both in the prosecution and defence of all suits, all the proceedings that the insolvent might have taken for the benefit of the estate. The assignee "may intervene and represent the insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment;" and the section then proceeds to enact that "if after an assignment has been made, or a writ of attachment has issued under this Act, and before he has obtained his discharge under this Act, the insolvent sues out any writ, or institutes, or continues any proceeding of any kind or nature whatsoever, he shall give to the opposite party such security for costs as shall be ordered by the Court before which such suit or proceeding is pending, before such party shall be bound to appear, or plead to the same, or take any further proceeding therein." It is this clause which the Courts have had to interpret in the decisions referred to.

The first case was that of *Mackinnon & Thompson*, decided by the Court of Queen's Bench in Appeal at Montreal, noted on page 494. In this case Mackinnon had been condemned in the Court below, and desired to appeal from the judgment. But in the meantime the plaintiff had become an insolvent, and the defendant naturally wished for security for costs in the event of his getting the judgment set aside. The assignee, it will be noticed, "may" intervene, but is not compelled to do so. Where he does not choose to do so, the opposite party is left with the insolvent as his adversary. The Court of Appeal unanimously held in the case cited, that the appellant was not entitled to exact security from the insolvent, so long as the latter was not taking any proceeding to push on the case.

Two other decisions by the Superior Court at Montreal are noted in the present number of this journal. In *Marais v. Brodeur*, an action on a note, Judge Jetté held that an insolvent (the maker, not sued) may intervene in the case simply to take up the *fait et cause* of the defendant, who was the endorser, and defend himself from liability, without giving security to the plaintiff. In the other case, *Beausoleil v. Bourgoin*, the same Judge held that an insolvent defendant, who has filed an opposition to a judgment against him, cannot, without giving security, call upon the plaintiff to declare whether he admits or contests the opposition.

These decisions are important because we do not notice any reported cases bearing upon the clause in question. Mr. Clarke, in his interesting work, mentions the case of *Lee v. Moffatt*, 6th Upper Canada Practice Reports, p. 284, in which an insolvent, who filed a bill to set aside an attachment, and made the assignee a defendant, was required to give security for the assignee's costs; but the point there was obviously different.

MOOT COURTS.

We are pleased to notice that the system of Moot Courts, as commonly practised in the law schools of the United States, is being introduced into the McGill Faculty of Law; and although the innovation is made by the students themselves we understand that the project receives the hearty endorsement of the Faculty. "Mootings" have been found by experience to be a valuable aid in producing good pleaders, and we trust that the efforts of the promoters to give our students the advantages of the exercise may be successful.

THE BALLOT.

In the case of ballot-box stuffing, in which Forget and five others were accused of putting illegal ballots into a ballot-box and taking legal ballots out, Judge Ramsay prefaced his address to the Jury with some observations regarding the ballot. "With a laudable desire to put an end to all election frauds and all acts of an improper influence," the Judge observed,

"the Legislature of this country has heaped repressive statute on statute until, at last, we have arrived at this ingenious contrivance, the ballot-box. It is very curious, indeed, that practical men such as our legislators generally are, should have required the test of actual experience to apprise them of the danger of this peculiar and very un-English mode of ascertaining the public will. The principle of the ballot box has been long discussed. Fifty years ago, the very inconvenience which we find now before us, and which has kept us here so many days, was foretold. It is impossible to conceive that members of Parliament were convinced that so absurd a scheme could lead to any good result. The only way we can account for its having been admitted in England and here is that members of the Legislature yielded to outside pressure and were afraid to say what they really thought, for fear of being accused of a desire to favor election frauds. But no accusation could be more unfounded, for they are the very people who suffer most acutely from such frauds."

The ballot system is open to very serious objections. Not least among them is that it may affect and even reverse the real expression of the electoral mind, because so many ballots marked with honest intentions may be thrown out for informalities as actually to change the result of the election. The counting by a large number of persons, styled deputy returning officers, can never be very safe or satisfactory. The system becomes still more obnoxious when it is found to open the door to such gross frauds as were detected in the Jacques Cartier election. But on the other hand, it must be admitted that it does away with a great deal of the excitement that used to attend elections. People do get excited still, but it is excitement after the result is proclaimed, and does not lead them to interfere with the progress of the voting.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Nov. 13, 1878.

JETTÉ, J.

MARAI V. BRODEUR, and BRODEUR, intervening.

Intervention—Security for Costs—Art. 29, C. C.—Insolvent Act, 1875, Sect. 39.

An intervening party residing beyond the limits of

the Province, and an insolvent under the Insolvent Act, who intervenes merely as the *garant* of the defendant and for the purpose of taking up the *fail et cause* of the latter and defending the action brought against him, is not bound to give security for costs.

The intervening party, who was the maker of a note on which the defendant was sued as endorser, desired to intervene for the purpose of taking up the *fail et cause* of defendant and showing that the note was given without consideration.

The plaintiff asked that the intervening party be ordered to give security for costs, both as being domiciled in the United States, and as being an undischarged insolvent.

The Court held that Art. 29 of the Code did not apply to a case like this, where a debtor simply sought to defend himself. And so long as he was merely on the defensive section 39 of the Insolvent Act did not apply.

Motion rejected.

Bertrand for the plaintiff.

Ouimet & Co. for the defendant and intervening party.

BEAUSOLEIL V. BOURGOIN et al., and BOURGOIN et al., opposants.

Security for Costs—Insolvent Act, S. 39—

Opposition.

A defendant who has become an insolvent under the Insolvent Act, cannot call on the plaintiff to declare whether he admits or contests an opposition filed by him to the execution of a judgment against him, without giving security for costs.

The plaintiff being called upon to declare whether he admitted or contested the opposition, moved that the opposants be previously required to give security for costs, they having become insolvent since their opposition was made. The opposition, which was made by the defendants, sought to set aside the seizure, for irregularities in the bailiff's proceedings.

The opposants objected that being defendants they were not bound to give security.

JETTÉ, J., held that as the opposants were endeavoring to force the plaintiff to proceed, Sect. 39 of the Insolvent Act applied.

Motion granted.

Geoffrion & Co. for plaintiff.

Loranger & Co. for defendants and opposants.

Montreal, Nov. 11, 1878.

TORRANCE, J.

MCCALLUM v. HARWOOD et al.

Peremption—Elected Domicile—Service.

An action was pending in the District of Montreal, and no proceedings having been taken for three years, the defendant moved for *péremption d'instance*. The plaintiff's attorney *ad litem* resided in an adjoining district, and the service was made personally upon him there. *Held*, that this was a good service, though the plaintiff's attorney had elected a domicile in the District of Montreal where service could be made.

Peremption granted.

Trenholme for plaintiff.

Bowie for defendant Harwood.

Montreal, Nov. 13, 1878.

TORRANCE, J.

PRENTICE v. THE GRAPHIC COMPANY.

Security for Costs—Temporary Absence—C. C. 29.

Held, that a plaintiff temporarily non-resident will not be held to give security for costs under C. C. 29; the Court, before ordering security, must be satisfied that the non-residence is more than temporary.

TORRANCE, J., in rejecting the motion for security, referred to a case of *Cole v. Beale*, 7 Moore 613, in which Lord Chief Justice Dallas said "that it was incumbent on a defendant to make out a clear case of permanent residence abroad, either actual or intended, to entitle him to call on the plaintiff to give security for costs, and that an affidavit founded on a mere belief was not sufficient for this purpose."

Motion rejected.

J. L. Morris for plaintiff.

S. Bethune, Q. C., for defendants.

Montreal, Nov. 18, 1878.

TORRANCE, J.

BOUSQUET v. BROWN.

Review—Deposit.

Held, that a party inscribing in review is entitled to a return of the deposit so soon as the judgment has been reversed in his favor.

The plaintiff, inscribing in review, having

obtained a reversal of the judgment, moved for an order upon the Prothonotary to return the deposit.

The Prothonotary objected that 15 days had not elapsed since the date of the judgment; and further that he was not bound to return the deposit until it was established that the defendant would not appeal to the Queen's Bench, or until that Court had confirmed the judgment in Review.

TORRANCE, J., granting the plaintiff's motion, said that, desirous of securing uniformity in the holdings of the Court, he had conferred with his brother Judges, and had also communicated with the Chief Justice at Quebec. The Prothonotary of the District of Quebec informed the Chief Justice that his practice was to return the deposit without delay as soon as the inscribing party had succeeded in Review. The Judges in Montreal were all agreed that the deposit should be returned.

Motion granted.

P. H. Roy for plaintiff.

A GLIMPSE OF THE COURTS IN RIO DE JANEIRO.

While in Rio de Janeiro last August I visited the courts of justice. My friend first took me to a judge at Chambers. The audience room is very neatly furnished: the entrance is through curtain doorways, and there is no slamming nor squeaking of doors; all is quiet and decorous and comfortable; a portrait of the Emperor of Brazil hangs over the judge's chair: this court corresponds to the Special Term of the New York Supreme Court; the judge tries the cause, in the first instance, without a jury; a jury is only employed here in criminal cases, never in civil. The courts, as a rule, are in poor buildings, but have pleasant suites of rooms. The Supreme Court of the Empire is a Court of Appeal; it never tries cases, but only reviews them, and confirms them or sends them back for new trial. There is an intermediate court called the Court of Appeals, which hears the first appeal from the trial judge. I saw the Supreme Court sitting; there are seventeen judges, all old men, wearing heavy cloth gowns, and each one with a snuff-box and large colored silk handkerchief before him; they sit around one large table, the chief justice at the head, and hanging

above him a portrait of the Emperor in military costume. These judges argue with each other, in banc, upon printed appeal books; they seem to take sides like counsel, differing warmly. Each case is decided by a majority vote. In this court there is no oral argument by counsel allowed, except in *habeas corpus* cases; all others are submitted on printed points, and no counsel are present. Lawyers are divided into solicitors and counsellors; the latter must be doctors or bachelors of law; a doctor or bachelor may be a solicitor, but not *vice versa*; doctor is a merely honorary title; but only a doctor can wear a ring with a ruby in it, on the third finger of the left hand. A doctor of medicine can wear an emerald ring.

Solicitors study five years for their degree of bachelor, and must wait three years more for the degree of doctor. I visited the Orphans', or Probate Court; the crier seemed to do most of the business there. There, too, is a portrait of the Emperor over the judge's head. Then I went to the Police Court, and witnessed the jury trial of a negro slave, accused of assault with intent to kill. The district attorney made a fine speech, very well delivered; he was dressed in a silk gown or surplice, with a long lace tie with broad ends; he acted well; and with his cast of feature, and style of insinuating to the jury, would make a splendid Iago. There are two district attorneys in Rio, each getting \$2,000 a year, and working every other month; in their off months they can practice for themselves. When the witness for the prosecution was sworn every person in the court room rose, to show respect for the oath. The judge wears a heavy cloth gown. There is no portrait of the Emperor in this court; where the jury exist the people rule. It was a good looking jury. Only one witness was called for the prosecution; as he told what he saw of the assault, the accused hung his head and looked guilty; his counsel was paid by his owner, probably \$250. The defence did not cross-examine nor produce any witness in this case. The district attorney, when addressing the jury, stood by the side of the judge. The prisoner's counsel stands in a detached pulpit, at the opposite end (from the judge, of the table, where the jury sit. I was told that this gentleman before me was the best criminal lawyer in Rio. He lately received one fee of \$10,000 to defend an accused planter. He certainly made a splendid

speech in this case, which I easily understood, even with my limited knowledge of Portuguese, because of his deliberate, rotund and finished delivery. It was a magnificent speech as a piece of oratory. He began by saying that this is not a trial of the accused by his peers, "for you are freemen and gentlemen, but the prisoner is a miserable slave; therefore, stamp on him! Crush him! Give a great victory to progress and civilization by taking vengeance on this poor serf! Vengeance, for what? Because when he was struck, he struck in return. But you are not his peers; he has no wife—he can have none; tear his woman from his arms—treat them like beasts! He has children—but they are not his by law; away with him to prison for twenty years, for what can a slave's unlawful children care for him?" It was fine. Then he attacked the indictment, or accusation, and finally settled down to lead the jury quite away from the actual issue and to interest them in side points. But all in vain. The stupid negro sitting there hanging his head was too heavy a weight, and the jury brought him in guilty, and fixed the sentence (which duty here devolves upon them) at the full term, twenty years at hard labor, as asked by the public prosecutor, and the owner lost her slave and her expenses.

One of the pleasantest features in the Brazilian court rooms was the courtesy and consideration for each other on the part of the gentlemen of the bar; it was a delightful contrast to the jostling and disrespect which prevail in New York city, in crowded chambers especially.—
Geo. W. VAN SICKLER in *Albany Law Journal*.

RECENT UNITED STATES DECISIONS.

(Concluded from page 540).

Illegal Contract.—1. By an agreement between A. and B. Coal-mining Companies, B. agreed to take at a fixed price all the coal which A. might wish to send to a certain district, not exceeding a certain amount per month, which amount was much less than A.'s monthly produce; and A. agreed to sell no coal to any other party to come into that district. *Held*, that the contract was unlawful as in restraint of trade; that it was entire; and that the promises were dependent; and that A. could not recover the price of coal delivered under the contract, though it had

refused to carry out the contract fully.—*Arnott v. Pittston & Elmira Coal Co.*, 68 N.Y. 558.

2. Defendants covenanted, in consideration of \$50, to dig a ditch through plaintiff's land, and also to cause proceedings to be stayed on an indictment pending against plaintiff for creating a nuisance. *Held*, that the whole covenant was unlawful, and that no action would lie for a breach of either branch of it.—*Lindsay v. Smith*, 78 N. C. 328.

3. A promise of a married man to marry when a divorce shall be decreed in a suit then pending between himself and his wife, is void as against public policy, and no action lies for a breach of it.—*Noice v. Brown*, 10 Vroom, 133.

Indictment.—1. An indictment for burning a house, with intent to defraud the insurers, describing them only as "the A. Insurance Company," is bad; for, if the insurers are a corporation, that fact must be averred; and, if they are a voluntary association, their individual names must be set out.—*Staaden v. The People*, 82 Ill. 432.

2. Indictment not signed by the prosecuting officer *held* sufficient.—*State v. Reed*, 67 Me. 127.

3. Indictment for murder, describing the assault, and charging that, of the mortal wound inflicted by the prisoner, the deceased did [then and there] instantly die, *held* good, if the words in brackets were inserted; but bad, if they were omitted.—*State v. Lakey*, 65 Mo. 217; *State v. Steeley*, *ib.* 218.

4. Indictment for aiding to escape from jail a prisoner committed on a charge of felony, *held* good, without showing what particular felony the prisoner was charged with.—*Stark v. Addcock*, 65 Mo. 500.

Insurance (Fire).—1. A policy was conditioned to be void, if at any time during its continuance the buildings insured should become vacant or unoccupied. The buildings were vacant when the policy was issued, and the insurers knew the fact; afterwards they were occupied, and were again vacated before a loss happened. *Held*, that the insurers were liable.—*Aurora Ins. Co. v. Kranich*, 36 Mich. 289.

2. Insurance was made on a building which stood on leased land, which fact was not expressed in the policy; and this, by a condition in another clause of the policy, made the insurance void. But the insurer's agent knew

the fact before the policy was issued. *Held*, that the condition was waived. (Three judges dissenting).—*Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434.

Insurance (Life).—1. The assignee of a policy of life insurance cannot recover on the policy, if he has no insurable interest in the life. (One judge dissenting).—*Missouri Valley Life Ins. Co. v. Sturges*, 18 Kans. 93.

2. A life-insurance policy provided that, if, after the payment of two or more annual premiums, the policy should at any time cease by reason of non-payment of premiums, then, upon surrender of the policy within a year from such time, a new policy should be issued for a sum proportionate to the premiums actually paid. The policy lapsed by a non-payment of premium; but was never surrendered, nor was a new one issued. *Held*, that a proportionate sum was nevertheless recoverable; and this whether the assured died before or after the expiration of a year from the lapse.—*Dorr v. Phoenix Ins. Co.*, 67 Me. 438; *Chase v. Phoenix Ins. Co.*, *ib.* 85.

Interest.—A promissory note bearing interest at a rate greater than that allowed by law, in the absence of special agreement will bear interest only at the legal rate, as damages, after maturity.—*Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonault*, *ib.* 540.

Judgment.—1. J. S. died seised of land, which his heirs sold, reserving a lien for the purchase-money. Afterwards, creditors of J. S. filed a bill in the United States Circuit Court, making all but one of the heirs parties, and by virtue of a decree made in that suit the land was sold for payment of the debts of J. S. *Held*, that the heir, who was not a party to that suit, was not bound by the decree from enforcing his lien in a State court.—*McPike v. Wells*, 54 Miss. 136.

2. In ejectment, the defendant claimed title under a deed of the administrator of J. S., appointed by the Probate Court of C. County. *Held*, that the plaintiff could not show that the Probate Court had not jurisdiction to make such appointment, because J. S. did not reside in C. County. (Overruling former decisions).—*Johnson v. Beazley*, 65 Mo. 250.

Larceny.—1. A. stole goods in New York, and sent them into Massachusetts by an agent,

not an accomplice in the theft. *Held*, that A. was indictable for larceny in Massachusetts.—*Commonwealth v. White*, 123 Mass. 430.

2. Indictment for larceny of "five fish," not showing that the fish were reclaimed or confined, *held*, bad.—*State v. Krider*, 78 N. C. 481.

Libel.—"J. S. was accused of stealing a horse; he sued the accuser, and a verdict was found for the defendant." *Held*, that the printing and publishing of these words was actionable.—*Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539.

Limitations, Statute of.—1. An action was brought on an official bond, in the name of the State, at the relation of one who was adjudged to have no interest entitling him to sue; and an amendment was made by filing a new complaint, with a different relator; in the mean time, the statute had run from the commencement of the original suit. *Held*, that the action was barred.—*Hawthorn v. The State*, 57 Ind. 286.

2. A note was made payable thirty days after demand; no demand was made for more than six years and a half. *Held*, that an action on the note was barred by the statutory limitation of six years.—*Palmer v. Palmer*, 36 Mich. 487.

3. An indictment is not demurrable on the ground that the offence charged appears on the face of the indictment to be barred by the Statute of Limitations.—*Thompson v. The State*, 54 Miss. 740.

Malicious Prosecution.—One who maliciously and without probable cause procured an inquisition of lunacy to be prosecuted against another, who was found by the jury to be of sound mind, was *held* liable to the alleged lunatic for all damages suffered by him, in excess of taxable costs.—*Lockenour v. Sides*, 57 Ind. 360.

Mandamus.—Provision is made by statute to enable a party tendering a bill of exceptions, which the judge refuses to allow, to prove the truth of his exceptions. A judge having refused to allow a bill of exceptions, *held* that he was not compellable by *mandamus* to do so, the party grieved having another specific remedy under the statute.—*State v. Wickham*, 65 Mo. 634.

Master and Servant.—An inspector of machinery employed by a railroad company negligently failed to discover and remedy a defect in a brake, whereby a brakeman was injured. *Held*, that the inspector was not a fellow-servant of the brakeman, and therefore that the company was liable to the latter for the negligence of the former.—*Long v. Pacific R. R.*, 65 Mo. 225.

Mortgage.—1. A., for the purpose of enabling B. to raise money for him, made a promissory note, payable to the order of B., and secured by mortgage duly recorded. B. wrongfully pledged the note, without indorsing it, for his own debt to C., and afterwards assigned the mortgage and another note, procured from A. by fraud, to D. for value. *Held*, that C. was not, in the absence of fraud on the part of D., entitled in equity to an assignment of the mortgage.—*Blunt v. Norris*, 123 Mass. 55.

2. The holder of a note payable to his own order, and secured by mortgage duly recorded, indorsed the note to A., and afterwards assigned the mortgage to B., together with a note similar in terms to that described in the mortgage. Both A. and B. were *bona fide* purchasers for value. *Held*, that A. was entitled in equity to an assignment of the mortgage from B.—*Morris v. Bacon*, 123 Mass. 58.

3. A. made a note to B., and assigned to him a mortgage and a note indorsed in blank, purporting on its face to be secured by it, "the same being collateral to" A.'s note. The assignment was duly recorded; B. afterwards, by an assignment in like words duly recorded, assigned the mortgage to C. and indorsed A.'s note to him; and subsequently indorsed the mortgage note to D., and fraudulently assigned the mortgage to him on a separate piece of paper. *Held*, that C. was entitled in equity to an assignment of the mortgage note from D.—*Strong v. Jackson*, 123 Mass. 60.

4. A second mortgagee, whose mortgage is duly recorded, may maintain an action against one who impairs his security by removing fixtures, claiming them under a subsequent chattel mortgage made by the mortgagor; and in such action the plaintiff need not prove that the defendant had actual notice of his mortgage, or intended to injure him, nor that the mortgagor is insolvent.—*Jackson v. Turrell*, 10 Vroom, 329.

5. A mortgagee, after condition broken, not in possession, cannot replevy a chattel which was a fixture and subject to the mortgage, and which has been wrongfully severed and removed by the mortgagor or his assigns.—*Kircher v. Schalk*, 10 Vroom, 335.

Municipal Corporation.—1. A city was authorized by statute to make and maintain reservoirs and hydrants "in such places as may be deemed proper." A building in the city was destroyed by fire, which might have been extinguished but for the neglect of the city in cutting off the water from a hydrant near by. *Held*, that the owner of the building had no cause of action against the city.—*Tainter v. Worcester*, 123 Mass. 311.

2. A city was authorized by statute to purchase a ferry, and run it "in such manner and upon such rates of ferriage as the board of aldermen shall from time to time determine." The city purchased the ferry, and afterwards the council voted to run it free of toll after a certain future day. *Held*, (1) that the vote was illegal; (2) that, on application made before the day fixed, a *mandamus* should be granted to compel the city to collect tolls.—*Attorney-General v. Boston*, 123 Mass. 460.

3. A city was authorized by statute to issue bonds to a certain amount. *Held*, that it might issue bonds to a greater amount, to pay for necessary street improvements, though no such power was expressly given by its charter. (Three judges dissenting.) *Williamsport v. Commonwealth*, 84 Penn. St. 487.

Negligence.—Action to recover for injuries caused by the falling of defendant's wall on plaintiff, while engaged in removing a wall on the adjoining estate, very near to, but distinct from, defendant's wall. It appeared that both walls belonged to buildings which had been burnt six months before, and were left standing to a height of ten or fifteen feet, with rubbish piled nearly to their top. It did not appear that defendant's wall was dangerous, or could have fallen while both buildings stood, or while they remained as they were after the fire; or that defendant had notice, or was bound to know, that the wall on the adjoining estate had been, or was to be, removed. *Held*, that the action was not maintainable.—*Mahoney v. Libbey*, 123 Mass. 20.

2. Plaintiff, while passing along a highway, was injured by the fall of a brick from a wall which defendant was building. *Held*, that defendant was liable, if he was negligent in not providing safeguards or barriers for the protection of passers-by, though his servants were not negligent in handling the bricks.—*Jager v. Adams*, 123 Mass. 26.

3. An inspector of coal oil branded empty barrels "approved," and left them with a manufacturer, who filled them with oil below the test, and sold them to a dealer, who sold to A. some of the oil, which exploded when used to fill a lamp, and killed A.'s wife. *Held*, that the inspector was liable to a suit on his official bond for A.'s benefit.—*St. Louis County v. Fassett*, 65 Mo. 418.

4. In an action at common law to recover for injuries caused to plaintiff's vessel by a collision arising from the negligence of those in charge of defendants' vessel, it appeared that the former did not carry the lights prescribed by act of Congress. *Held*, that this was not conclusive evidence of negligence; and that evidence that she did carry such lights as were usually carried by vessels in these waters was admissible, not to excuse the plaintiff, but to show negligence in the defendants who had knowledge of the usage.—*Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

Officer.—1. The office of clerk of a city court was usurped by one who claimed under an appointment by the court, which appointment was not authorized by law; and he held the office *de facto*, and drew the salary, which by law was payable quarterly by the city, until he was ousted by *quo warranto* at the suit of the clerk *de jure*. *Held*, that the latter could not afterwards recover of the city the salary paid to the usurper.—*Dolan v. New York*, 68 N. Y. 274.

2. A city officer was nominated by the mayor and confirmed by the common council; he ought, by law, to have been appointed by the mayor alone. *Held*, that the appointment was well enough. (One judge dissenting.)—*People v. Fitzsimmons*, 68 N. Y. 514.

3. In a *quo warranto*, the question was whether the term of office of the defendant, who held an office tenable for three years, had expired. *Held*, that the term began to run

when the defendant was appointed, and not when he qualified.—*Haight v. Love*, 10 Vroom, 476. (Court of Errors affirming judgment of Supreme Court in s. c. ib. 14.)

Ordinance.—By the Constitution, all fines collected "for any breach of the penal laws" are devoted to a public use. *Held*, that fines imposed for breach of a city ordinance were not within this provision.—*Fennell v. Bay City*, 36 Mich. 186.

Payment.—Money was lent on bond and mortgage, the mortgagor's attorney drawing the papers and paying over the money to the borrower. The borrower paid one instalment of interest to the attorney, by whom it was remitted to the lender, and afterwards the borrower, before the bond was due, paid the principal of it to the attorney, who had no authority to receive it, and had not the papers in his possession, and who embezzled the money. *Held*, that the borrower was not discharged.—*Smith v. Kidd*, 68 N. Y. 132.

Pledge.—1. In an action by payee against maker of a promissory note, the maker cannot set off or recoup the value of property pledged by him to the payee as collateral security for the note, and stolen from the payee; even if the latter was negligent in keeping the property.—*Winthrop Bank v. Jackson*, 67 Me. 570.

2. The A. bank deposited bonds with the B. bank as security for its over-drafts. A. became insolvent, and on a settlement and closing of business was found indebted to B. Afterwards, bills drawn by A. before the insolvency and settlement were presented for acceptance. *Held*, that B. was entitled to be paid the balance due out of the proceeds of the bonds, in preference to the holders of the bills.—*Garvin v. State Bank*, 7 S. C. 266.

Railroad.—1. A railroad ticket from Portland to Boston, *held*, not good for a ride from Boston to Portland.—*Keeley v. Boston & Maine R. R. Co.* 67 Me. 163.

2. By statute, a railroad company, by whose negligence any person is killed, is liable to a penalty recoverable by indictment to the use of his next of kin. *Held*, that a company which had mortgaged its road was not indictable under the statute for the negligence of the servants of the mortgagee in possession.—*State*

v. European & North American R'y Co., 67 Me. 479.

Religious Society.—Where it appeared that there were trustees of a church, and there was no further evidence as to who had power to make contracts for the church, *held*, that the minister could not employ a sexton so as to bind the church for his wages.—*St. Patrick's Church v. Gavalon*, 82 Ill. 17.

Sale.—1. Trover for a machine. Defendant claimed it under a sale and delivery by the owner, made on condition that the title should not pass till the price was paid in full; plaintiff, under a mortgage from the same owner, made after the conditional sale to defendant, and after the price was partly paid, but before it was paid in full. *Held*, that the plaintiff was entitled to recover.—*Everett v. Hall*, 67 Me. 497.

2. Defendant ordered goods of plaintiffs, who delivered them to a carrier for him, but gave no notice that they had filled the order; and the goods never reached him. *Held*, that he was liable to plaintiffs for the price. (One judge dissenting.)—*Ober v. Smith*, 78 N. C. 313.

3. An agreement was made for the sale of "500 barrels of strained rosin." The buyers selected and took away that number out of a larger number of barrels of rosin belonging to the sellers. Afterwards, they discovered that some of the barrels contained rosin not strained, but of an inferior quality. *Held*, (1) that a warranty was implied on the part of the sellers that the rosin should be strained rosin; (2), that the act of the buyers in selecting the barrels was no waiver of the warranty.—*Lewis v. Rountree*, 78 N. C. 323.

4. A. bought and paid for 200 bushels of corn, part of a lot of 500 bushels owned by B., who agreed to retain the 200 bushels till they were in a condition to keep well, and then to deliver them to A. While the corn remained undivided, an execution against B. was levied on the whole of it. *Held*, a valid levy as against A.—*Hires v. Hurff*, 10 Vroom, 4.

Set-off.—Where a special tribunal and process were prescribed by law for enforcing claims against the State, *held*, that the defendant in a civil action brought by the State could not set off a demand against the State, growing out of

a distinct transaction.—*Raymond v. The State*, 54 Miss. 562.

Statute.—The court refused to declare a private statute void, without further evidence than the agreement of counsel that it was passed without the notice required by the Constitution.—*Gallin v. Tarboro*, 78 N. C. 119.

Surety.—1. The official bond of a sheriff was conditioned that he should account for moneys collected by him within a certain time. Afterwards, the time was extended by statute. *Held*, that the sureties on the bond were not discharged.—*Prairie v. Worth*, 78 N. C. 169.

2. Action against the sureties on an official bond. Plea, that before the making of the bond the officer had held the same office, and had embezzled moneys, and was a defaulter; of all which the obligee at the time of making the bond had notice, but the sureties had not. *Held*, good.—*Sooy v. The State*, 10 Vroom, 135.

Tax.—1. By force of an amendment to a city charter, changing the limits of the city, lands which were subject to a lien for unpaid city taxes were brought outside the new city limits before the day fixed for their sale. *Held*, that the lien was lost.—*Deason v. Dixon*, 55 Miss. 585.

2. The Constitution provides that all property shall be taxed in proportion to its value. A statute enacted that every owner or harbourer of any dog should pay one dollar for the privilege of keeping him. *Held*, that dogs were not property, nor such payment a tax, within the meaning of the Constitution.—*Ex parte Cooper*, 3 Tex. Ct. App. 489.

3. A foreign coal-mining corporation sent coal by rail through the State to tide-water, whence it was shipped to other States. All its business was done at an office in another State, where all orders were taken. *Held*, that the State could not tax it, either on the coal awaiting shipment at tide-water, or on that delivered from its cars in the State, direct from the mines, on orders transmitted through the foreign office.—*State v. Carrigan*, 10 Vroom, 35.

Trespass.—One who was in possession of land, under a parol contract to purchase it, dug clay from open pits on the land, and made it into bricks. *Held*, that he was not liable as a trespasser for so doing, though he afterwards

failed to carry out his contract to purchase.—*Beattie v. Connolly*, 10 Vroom, 159.

Trust.—Testator gave lands to a charitable use, under the direction of a trustee, to be appointed by a court. When the will was made, that court had no power to appoint a trustee for that purpose; but, before testator died, such power was conferred on the court by statute. *Held*, that the court might appoint a trustee.—*Mann v. Mullin*, 84 Penn. St. 297.

Verdict.—A jury, by consent of parties, returned their verdict to the clerk of court, and separated. The next morning, it was discovered that the verdict was for the plaintiff, not specifying any sum; whereupon the court reassembled the jury, and they found a proper verdict. *Held*, regular.—*Maclin v. Bloom*, 54 Miss. 365.

Warranty.—Land was conveyed with warranty; afterwards, the State, having title paramount, sold the land. *Held*, that the grantee might abandon the land, and sue on the covenant, though he had not been evicted or molested by the State or its grantee.—*Green v. Irving*, 54 Miss. 450.

Way.—A statute permitting owners of coal-beds on both sides of any stream to have a right of way either over or under such stream, between such coal-beds, for the purpose of mining the same, *held*, unconstitutional.—*Waddell's Appeal*, 84 Penn. St. 90.

Will.—1. By statute a nuncupative will is valid if made in the last sickness of the testator. *Held*, that it need not be shown, to establish such a will, that the testator had not time to make a will in writing, or that he had no hope of recovery.—*Harrington v. Stees*, 82 Ill. 50.

2. A testator erased certain clauses in his will, with the intent of revoking them only. *Held* (1), that the whole will was not revoked; (2), that those clauses were; (3) that the property covered by them, in the absence of any thing in the will showing a contrary intention, passed by a general residuary clause.—*Bigelow v. Gillott*, 123 Mass. 102.

3. A will written and signed with a pencil, *held*, valid.—*Myers v. Vanderbilt*, 84 Penn. St. 510.

CURRENT EVENTS.

ENGLAND.

THE LATE LORD CHELMSFORD. — Frederic Thesiger, one of the sons of the late Mr. Charles Thesiger, Collector of Customs in the Island of St. Vincent, was born in July, 1794. He entered the Royal Navy as a midshipman on board Her Majesty's ship *Cambrian*, and as a boy of thirteen witnessed the second bombardment of Copenhagen by the expedition under Sir James Gambler. The death of his uncle and his elder brother, and the destruction of his father's property in St. Vincent by a volcanic eruption, imposed upon Frederic Thesiger the duty of retrieving the family fortunes, and accordingly he determined to abandon the naval for the legal profession, and in 1818 he was called to the bar by the Society of Gray's Inn. His career as a junior barrister was remarkably successful, and in 1834 he became enrolled on the list of Queen's Counsel. The Dublin election inquiry which resulted in the unseating of O'Connell and Ruthven, afforded an opportunity for the display of his sagacity and ability, which firmly established Mr. Thesiger's reputation, and he was urged to enter the Parliamentary arena. In 1840 he unsuccessfully contested Newark, but a few weeks later he was elected for Woodstock which he represented until 1844, when, having been appointed Solicitor-General, he became member for Abingdon. In the following year, on the death of Sir William Follet, he was appointed to the office of Attorney General, which he vacated on the resignation of Sir Robert Peel in 1846. The accident of a day or two deprived him of the Chief Justiceship, which became vacant by the death of Sir Nicholas Tindal, and which fell into the patronage of the new government. From February to December, 1852, Sir Frederic Thesiger again held office as Attorney-General, and when the conservatives came into power in 1858 he abandoned a splendid practice at the bar in order to become Lord Chancellor with a peerage as Lord Chelmsford. He again succeeded to the woolsack on the return of Lord Derby to office in 1866. In February, 1868, he retired and was succeeded by Lord Cairns. From the year 1840 down to his accession to the Chan-

cellorship there was scarcely an important case in which the name of Sir Frederic Thesiger did not appear on either the one side or the other. His name will be remembered as a leader in the trial of "Tom Provis" for those daring and ingenious forgeries by which he endeavored to establish himself as heir to the estates and baronetcy of the late Sir John Smyth of Long Ashton, near Bristol—a trial exceeded in notoriety only by the more recent trial of Arthur Orton; in the strange action for libel brought by Achilles against Dr. Newman, in which he was for the prosecution; in the extraordinary issue directed out of Chancery in respect of the last will and testament of the Duchess of Manchester, and in the prosecution of the directors of the Royal British Bank in 1857. One of the most important decisions which marked his Chancellorship was that of the great Shrewsbury peerage case.

TREASURE TROVE. — The *Solicitor's Journal* calls attention to the singular state of the law as regards treasure trove. Treasure trove, as Coke says, "where any gold or silver, in coin, plate or bullion, hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, doth belong to the king or to some lord or other by the king's grant or presumption;" and it is the duty of the coroner to inquire who are the finders of treasure trove, and where it is, and whether any one be suspected of having found and concealed a treasure—which, saith an old statute of 4 Edw. 1, "may be well perceived where one cometh riotously haunting taverns and hath done so of a long time." Concealment of treasure trove is, it appears, punishable by fine or imprisonment; but it has been laid down that "the taking of goods whereof no one had a property at the time cannot be felony; and therefore, he who takes any treasure trove * * before [it has] been seized by the persons who have a right thereto is not guilty of felony." 2 Hawk. P. C. 149. But the better opinion seems to be that, although the sovereign or lord has no definite property in treasure trove till he has seized, yet the true owner, though unknown, who has lost the money, may still have a property in it. 2 East's P. C. 606. And it is, of course, clear that unless the appropriator has reasonable grounds for supposing that the owner cannot be found, his taking the

treasure may amount to larceny. Where this is not so, obvious difficulties arise as to proof of felonious taking, but an ancient judge appears to have felt no hesitation in laying down the rule that larceny may be committed by stealing goods, the owner of which is unknown, because, as he sagely remarked, the felony would otherwise go unpunished, "*que serra un grande mischiefe en la ley.*"

FRANCE.

THE SENATORIAL ELECTIONS.—A curious constitutional point, says the *Manchester Guardian*, is being raised in France with respect to the partial elections which are approaching for the refilling of seventy-five senatorial seats. The constitutional law passed in February, 1875, simply provided that a third of the Senate should retire every three years. The government, in virtue of this rule, have fixed the elections for the 5th of January, in order to have everything ready for the session which begins a few days later. Many of those, however, whose seats are thus affected, knowing that in the present temper of the country they have no chance of re-election, deny that the vacancies will occur so soon. It is true that they have sat for three parliamentary years—that is to say, for three sessions; but they will not have sat for three natural years till the 8th of March, that being the third anniversary of the meeting of the Senate.

CANADA.

STENOGRAPHERS' FEES.—In a communication from a "Stenographer" to a daily journal, the following are given as the rates of remuneration in the places mentioned. "Ontario:—Salary \$1,500 per annum for official reporters. When not regularly appointed, a reporter, when employed, is paid \$5 per diem and expenses, for note taking, and when notes are transcribed, for each copy he receives 10c per folio. As three copies are usually required in appeal cases, and manifold paper is used, the remuneration is practically 30c per folio and \$5 per diem and expenses.

Illinois—Ten dollars per diem and 25c per folio for transcribing.

California—Ten dollars per diem and 20c per folio for transcribing.

England—A guinea per diem (two guineas

if the sitting be a long one) and 8d per folio of seventy words for transcribing.

Nebraska—Salary \$1,000 per annum, and 10c per folio for transcribing.

New York—District courts, salary \$2,000 per annum; Supreme, Superior and Common Pleas courts, salary \$3,500 per annum; Surrogate court, salary \$3,000 per annum; Circuit courts, \$5 per diem and expenses, and 10c per folio for transcribing.

New Jersey—\$10 per diem, and 10c per folio for transcribing.

Iowa—\$8 per diem, and 10c per folio for transcribing.

Wyoming Territory—Salary. \$2,500 per annum, and mileage at 10c per mile when reporting district courts, and 15c per folio for transcripts. The reporter must pass a strict examination, and be a thoroughly expert reporter before he can be appointed.

Ohio—Ten dollars per diem, and eight cents per folio for transcripts."

UNITED STATES.

THE STEWART REMAINS.—The curious assertion has been made by the newspapers that because the Stewart *cadaver* was stolen for purposes of blackmail, the law provides no penalty. Admitting the alleged purpose to have been the real one, the case would still fall within 2 R. S. 688, § 13, which imposes both fine and imprisonment for removing dead bodies, "for the purpose of selling the same" or "from mere wantonness." The purpose alleged was to extort money from the friends of the deceased, or, in other words, to compel them to buy back the *cadaver*, a "purpose of selling" within the statute. But aside from this, the wrongful removal of a dead body was an indictable offence at common law. In *Regina v. Sharpe, Dearsley and Bell*, 160, a man was indicted and convicted of a misdemeanor, for disinterring and removing, without authority, the body of his mother, and the conviction was sustained, although the removal was properly and decently made, and for the purpose of burying the body by the side of the prisoner's father, recently deceased. See also *Regina v. Feist*, id, 590; *Commonwealth v. Cooley*, 10 Pick. 39. In 4 Black. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned, which directed that a person who had dug a corpse out

of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relatives of the deceased consented to his re-admission. It was a felony at common law to steal the shroud or apparel from a dead body. 1 Hale's P. C. 515; 1 Russell on Crimes, 629; 3 Dane's Abr. 13. And it is so, also, under the statutes of this State.—*Albany Law Journal*.

SWITZERLAND.

A SINGULAR CLAIM FOR DAMAGES.—The Geneva correspondent of the *London Times* says, that a strange lawsuit has arisen out of the late manoeuvres of a portion of the Swiss army, near Morat. During the operations Herr Muller, ex-judge and commandant of a battalion in the Steinhausen brigade, recommended his men to abstain from drinking the beer of the Bohlen brewery, on the ground that it was likely to injure their health and render them less able to support the fatigue of marching and the weight of their accoutrements. The proprietor of the brewery, feeling himself much aggrieved at this order, and on the plea that it has operated greatly to his detriment, has brought an action against Herr Muller, laying his damages at a rather considerable sum. The beer, which has been submitted to analysis, is pronounced by experts to contain no ingredients injurious to health. On the other hand it is contended that when an officer on service orders or advises his men in good faith to abstain from the use of such food or drink as he may think likely to impair the value of their services to the State, it is not right that he should be exposed to the annoyance of an action at law, much less that he should be liable to be mulcted in heavy damages. The case excites much interest among officers in the army of the Confederation.

GENERAL NOTES.

The U. S. Commissioner of Patents reports 14,100 patents granted for the year ending June. Receipts, \$734,888. Expenditures, \$665,906; 1,505 trade-marks were registered.

CONCEALED ASSETS.—I once held some shares in a joint stock bank (limited). The directors wishing to launch into a system of finance, persuaded the shareholders to turn the concern

into an unlimited bank. I sold out at once. The system did not answer, and within a couple of years the bank was in liquidation. I was called upon to show cause why I should not be placed on the list of contributories. I had not much difficulty in doing this, for as it happened, I could prove that I had sold my shares in good faith and in good time. But one of my companions in misfortune had not been quite so prompt in getting rid of his shares, and the Bankruptcy Commissioners added his name to the list. A question arose as to his power to pay. A pleaded poverty, of course. He had not a shilling in the world. "You seem to enjoy good health," said the solicitor to the estate. "Yes, tolerable." "Good appetite?" "Yes, nothing to complain of." "Do not suffer from indigestion?" "Not much." "Ah! I see you have a fine set of teeth—your own, of course?" "Yes." "Come, now, what did you pay for them?" The poor contributory turned pale, and appealed to the Commissioner to protect him against importunate questions. "You can easily answer the question," said the Commissioner, coldly, and the tormentor calmly repeated it. "What did you pay for that set of teeth—40, 50, or 60 guineas? It is no good fencing with the question. I intend to have an answer. Sixty guineas?" The contributory drew himself up, indignantly pursing his lips, and refused to answer. "Fifty guineas?" More pantomime. But at last the answer came in a tone of indignant scorn, "Fifty-five guineas." "And how long have you had these teeth?" "Only the day before yesterday." "And you purchased them after you had notice of your liability as one of the shareholders of the bank?" "Yes." "That will do," said the solicitor, triumphantly. "You can take out your teeth and hand them over to the official assignee. They constitute one of the assets of this bank." And the poor man left the Court *sans* teeth, a sadder, but I hope a wiser man. I do not use false teeth, but I have never touched a share in an unlimited bank since, and wishing to keep my own teeth I do not think I shall.—*Mayfair*.

RHETORIC AT THE BAR.—Lord Ellenborough had a sovereign contempt for rhetorical flights. "It is written in the large volume of nature," said a barrister. "At what page?" gravely inquired the judge, taking up his pen.

The Legal News.

VOL. I. NOVEMBER 30, 1878. No. 48.

THE SUPREME COURT.

A difficulty, as most of our readers are aware, interposed in the way of swearing in the newly appointed Judge of the Supreme Court, and of proceeding with business at the last session of the Court. The difficulty arose from the absence of the Chief Justice, who was in Europe. This, and Mr. Justice Taschereau's resignation, left the Court without a quorum, which according to section 3 of the Supreme Court Act, must consist of five Judges: "The Supreme Court shall be composed of a Chief Justice and five Puisné Judges, any five of whom, in the absence of the other of them, may lawfully hold the said Court in term." And Mr. Justice H. E. Taschereau could not be sworn in to supply the vacancy, because section 9 says: "The said oath shall be administered to the Chief Justice of the said Courts before the Governor General, or person administering the Government of the Dominion, in Council, and to the *Puisné Judges of the said Courts by the Chief Justice.*" The presence of Chief Justice Richards, therefore, became necessary to solve the difficulty, and he was accordingly telegraphed for.

STENOGRAPHY IN THE COURTS.

"An old Stenographer" has addressed to us a letter on the subject of stenographers' fees, and the use of stenography in the courts, to which we willingly give place in the present issue. From this communication it appears that an accusation is made against certain stenographers of improper or exaggerated charges, that is to say, of charging for more work than has actually been done. This is a matter which has no connection whatever with the rate of remuneration fixed by the Court. It would be strange indeed that the rate should be cut down because the quantity is commonly exaggerated. That would be only punishing those who are honest and holding out a direct incentive to dishonesty. Overcharging should not be tolerated for a moment. The verification of sten-

ographers' accounts should be entrusted to a proper officer, and on his certificate only should the amounts be collectable. This is a mere matter of detail, much easier than the account keeping for telegraphic messages, which are also charged by the word. Anything like wilful overcharging should involve the exclusion of the offender from similar employment in the future.

We think our correspondent is right, when he says that the subject of stenography in the courts requires mature consideration with a view to legislative regulation. Thus far the system has been experimental, and with the experience of the past few years, some valuable improvements might perhaps be suggested in the course of a fresh consideration of the question. We have heard it proposed that stenographers should be officers of the court, paid by salaries, and should be empowered to curtail and abridge the notes of evidence. Doubtless, a great deal of useless matter may be found in the examinations of witnesses as conducted at present, and the printing of this for the purposes of appeals adds largely to the cost. But, on the other hand, it is possible for the Court to arrive at a much safer conclusion from the entire and unabridged examination than could be based upon any summary, even if made by lawyers, and the stenographers, be it remembered, need not be lawyers nor even law students. If stenography were commonly understood and practised, and the judges were sufficiently conversant with the art to take notes themselves, the power of abridgment might usefully be allowed. Under such a condition of things the notes taken by the judge who tried the case might be transcribed, if asked for, by secretaries engaged for the purpose. Where the judge's decision was accepted as final, and no intimation of appeal was given, there would be no practical end served by transcription at all. It might be too much at present to exact an acquaintance with short hand from all lawyers appointed to the bench. Yet the art seems to be gaining ground in mercantile establishments, and it is regarded as indispensable in many railway companies' offices. A great many clergymen write their sermons in this abbreviated style, and read their manuscripts with ease in the pulpit. In some printing establishments the notes of reporters have been

set up by compositors from the original manuscripts. These facts show that sufficient legibility can be attained to enable others to read short hand manuscripts, and it is obvious that the labor imposed on the judges would be less than that entailed on them at present at criminal trials where the judge alone takes notes. We offer this, however, as a simple suggestion, and not as a matured opinion.

JUDGE MILLER'S ADDRESS.

Mr. Justice Miller has occupied a seat on the bench of the Supreme Court of the United States for sixteen years, and besides the long and varied experience thus acquired, brings a clear judgment and an eloquent pen to the treatment of his theme. His address on legislation affecting the judiciary and the administration of justice generally, which will be found in the present issue, will well repay careful perusal.

CORRECTION.—Our attention has been called to an obvious erratum on page 481, in reference to the case of Sanborn, insolvent. At line 20 it is said that the "application" was rejected. As the context shows, it was the insolvent's "pretention" that was rejected, for the application was by the assignee to have the watch given over to him, and this was granted by the Court. We may take this occasion to say that we shall be thankful to any reader who observes an inaccuracy in the *LEGAL NEWS*, to call our attention to it. We strive to attain the utmost degree of accuracy, but if error by any chance creeps in, we are anxious that the correction shall be made in the same volume, so that no misconception may arise hereafter.

REPORTS AND NOTES OF CASES.

CIRCUIT COURT.

Montreal, Oct. 31, 1878.

PAPINEAU, J.

LA COMPAGNIE D'ASSURANCE DES CULTIVATEURS V. BEAULIEU.

Tariff—Preliminary Exceptions—Action for \$60 and under.

Held, that in cases for \$60 and under, preliminary exceptions should be received gratuitously by the clerk

of the Court. The deposit of \$4, and the fee of 6s. 8d. mentioned in the 25th Rule of Practice for the Circuit Court, being exigible only in cases above \$70.

The action was for a sum under \$60. The defendant having a *garant* to call in, filed a dilatory exception for that purpose, without making the deposit of \$4 required by the 25th Rule of Practice, or paying the fee of \$1.40, which she contended was not required in cases of \$60 and under.

N. Durand, for plaintiff, moved that the dilatory exception be rejected, being unstamped, and unaccompanied by the deposit required by law and the 25th Rule of Practice.

J. G. D'Amour, for the defendant, resisted the motion, contending that the 25th Rule of Practice had reference only to cases above \$60. He referred to *Alie v. Gamelin*, 14 L. C. J. 134; and *Desjardins v. Chretien*, 15 L. C. J. 56.

The Court rejected the motion, remarking that the jurisprudence was now settled both in the District of Montreal and Quebec.

Motion rejected.

N. Durand for plaintiff.

D'Amour & Dumas for defendant.

SUPERIOR COURT.

Montreal, Nov. 15, 1878.

TORRANCE, J.

MELLES et al. v. SWALES.

Motion for Security for Costs—Delay—Art. 107 C. C. P.

Held, that a motion for the production of a power of attorney and for security for costs cannot be presented after the expiration of four days from the return of the writ of summons.

Bethune & Bethune for plaintiffs.

E. Carter, Q. C., for defendant.

Montreal, Nov. 18, 1878.

MACKAY, J.

ANDERSON V. GÉRAIS, and GÉRAIS, Petitioner.

Insolvent—Permission to continue Trade.

Held, that a Judge has no jurisdiction under the Insolvent Act of 1875, to permit a trader to continue his trade, against whom a Writ of Attachment under the Act has been issued.

On the 6th of November instant, upon the affidavit of the plaintiff, disclosing a debt

amounting to \$375, a writ of attachment was issued, under the provisions of the Insolvent Act of 1875, addressed to William Rhind, official assignee, and the estate of the insolvent was seized and attached thereunder.

On the following day the defendant presented a petition to quash the writ, and also a petition praying to be permitted to continue his business pending the contestation of the first-mentioned petition, and offering to give security to such an amount as might be fixed by the Court.

On the argument of this petition, the counsel for petitioner cited section 7 of the Insolvent Act of 1875, and contended that this section authorized the Judge to grant it, and that the security to be ordered should not exceed the amount of the debt disclosed in the affidavit of the plaintiff.

The plaintiff's counsel argued that section 7 did not apply to cases in which a writ of attachment had issued, but only to those in which a demand of assignment had been made. The preceding sections, 4, 5 and 6, referred entirely to proceedings on a demand of assignment, and to the petition against such demand. In section 8 proceedings on writ of attachment were first mentioned, and neither in section 18, which allows the insolvent to present a petition to set aside the writ, nor anywhere else in the act is authority given to a Judge to permit an insolvent to continue his business while the contestation of a petition to quash the writ is pending. If the Judge held he had such authority, the answer to the petition set forth that the defendant was indebted to plaintiff in a much larger sum than that disclosed in the affidavit, and security should at least be given for the full amount due by the defendant to plaintiff.

MACKAY, J., dismissed the petition on the ground that he had not power under the act to order or allow the prayer thereof in a case where a writ of attachment had issued.*

Gonzalve Doutre, for Plaintiff.

M. M. Tait, for Petitioner.

COMMUNICATIONS.

STENOGRAPHERS' FEES.

To the Editor of THE LEGAL NEWS.

SIR,—Although you say the question of steno-

* Reversed in Review. See next number.

graphers' fees is hardly within the province of THE LEGAL NEWS, I am glad you have referred to it, as it is now and has been for a long time, one of the most vexed questions of the bar. The stenographers on one side bring a long array of figures to show that their labor is in other places considered to be worth what they are charging for it; while the members of the bar complain, and with a good deal of reason, of the amounts what they are called upon to pay on their depositions, and the burdens which are in consequence thrown upon their clients. It is no uncommon thing at all for the stenographers' fees to amount to half the total costs of the suit. Examine half a dozen witnesses at any length, *e. g.*, so as to occupy the greater part of a day, and the stenographers' fees alone will amount to thirty, forty or even fifty dollars. The reasons why they swell to so large an amount appear to be these: First, because there are now so many short-hand writers who have attached themselves to the Courts, and so much time is lost by the ordinary delay, adjournments, and postponements of suits, that they are compelled to charge a high price in order to make it an object to them to do the work—in other words, they are compelled by that law of self-preservation by which we are all influenced, to make as much out of each case as possible. Secondly, because many of the writers—I will not say all—dishonestly reckon a hundred words as two hundred. Indeed, I have myself seen folios which did not contain more than fifty words reckoned as two hundred. Under the old system, for which ten cents a hundred is paid, a little of this sort of thing is tolerable; but where you pay thirty cents, and have a number of depositions to file, it becomes intolerable. If the stenographers had been accustomed to exercise a little more honesty in this respect, they probably would not now find themselves reduced to twenty cents a hundred. The truth is that the whole system requires reformation. At present it is a perfect muddle. It has grown up like a wild plant, subject to no rules nor restrictions, and has been the cause of no end of dissatisfaction and probably of injustice. And the only parties to blame for all this are the lawyers themselves. Why do they not devise some plan which shall be equitable to all parties, and if necessary have it enforced by an Act of the legislature? The position as it is at present is

this: There is a large number of short-hand writers,—some who make a profession of it, and some who find it a useful auxiliary while prosecuting their studies for the bar. Some of them are proficient and some are not. The plaintiff's counsel engages the stenographer, that is, he yields to his solicitation to give him "the case," knowing no difference; or if the case has not been promised, takes the first who may happen to present himself, and in nine cases out of ten, does not know whether the evidence he has adduced has been correctly reported or not. He may be under the impression that a witness said something which he does not find in the deposition, but as the witness is supposed to have listened to and ratified what is there, and the writer has certified that it is a correct transcript of what the witness said, there is no help for it but to accept it as such. The reports of a really skilful short-hand writer are, as a rule, correct and reliable, but the great importance of the work which they are called upon to do, would seem to dictate that none but the most skilful should be employed, and these should be limited to a certain number and paid according to a tariff fixed by law. It would naturally be supposed that a matter of so much importance would long ago have been placed on a well-defined basis, but though the members of the bar here are very prompt to grumble, they are very slow to act, and the consequence is that that and a thousand other things connected with the practice of the courts in need of reformation are allowed to continue unchanged from year to year. What I would suggest, would be, that the Government employ the stenographers (by the medium of a judge who would appoint them on petition of members of the bar, or on other satisfactory evidence of fitness,) and pay them so much per day for the time they are actually engaged in Court, and so much per hundred words for transcribing. That this expense be met by a fixed rate or tax to be charged by the prothonotary per 100 words, payable as the Court-house tax or other regular tax on legal proceedings. The number of stenographers required under such a system would (at a rough guess) be four, viz: two French and two English, who would be sworn in once for all, and be, in fact, officers of the Court, and subject thereto. Any questions which would then arise concerning their remuneration would be between them and the

Prothonotary, and would in no way affect the attorney or his client. Under this system, also, students who desired it, and were qualified for the position, might be appointed, as their removal or change would create little or no difficulty. In case of a vacancy another in the same way could be appointed and sworn in by a judge, and the number authorized by law always maintained. By some such plan as this a great deal of the present difficulty would be avoided and the great question of remuneration be placed on a basis satisfactory to all parties.

Yours, &c.,

AN OLD STENOGRAPHER.

**MR. JUSTICE MILLER ON LEGISLATION
AFFECTING THE ADMINISTRATION
OF JUSTICE.**

At the second annual meeting of the New York State Bar Association, held on the 19th inst., Mr. Justice Miller, of the Supreme Court of the United States, delivered the following address:—

Gentlemen of the Bar Association of the State of New York:

The administration of justice in this country is committed by positive law and by immemorial custom, to a class of men for whom I know no better designation than that of Lawyers, because it comprehensively suggests the functions they are designed to fulfill, and the attainments which they are supposed to possess in the Science of the Law. In the practical exercise of these functions they are divided into two classes—the courts and the bar—the judges and the practitioners. It has been the custom sometimes to speak of the Bench and the Bar as of distinct bodies, with separate interests. But this is so only in a limited and qualified sense.

The Judge, from the nature of his duties as well as by the law of the land, must be a lawyer, and when he ceases to be a lawyer, he ceases to be fit for a Judge.

We are, therefore, all Lawyers, all members of the same honorable profession, all equally interested in the purpose for which our order exists—namely, the pure, the efficient, the perfect administration of Justice, so far as that is attainable.

The system of laws by which this is done,

founded mainly on that large body of customs, ancient statutes, and judicial decisions known as the Common Law of England, has in this country undergone many changes, and received large accessions from two sources—Legislation and the decisions of the courts. It is not necessary to inquire here, which of these has been of greater value, but it is appropriate to remark, that so far as judicial judgments have made or modified the law, it has been by reason of a necessity forced upon the courts and against their wishes. The progress of the people in wealth, in population and in the application to the varied pursuits of life, of new powers and new modes of doing business, required modifications of old rules and the application of new principles of law to this varying condition of affairs, which the legislative branches of our governments, State and National, failed in a large measure to provide.

I do not propose to discuss the nature and value of precedents of judicial judgments as authorities which must govern the decision of subsequent cases; but as preliminary to the observations which I propose to make on legislation, the other source of change in the law, it is important to say that according to my experience, the judge and the lawyer are more frequently called to consider the modifications of the Common Law arising from judicial, than from legislative action.

With these prefatory remarks I wish to call your attention to Legislation in this country—our common country—as it affects the administration of Justice in the courts; what it has been—what it ought to be.

It is not proposed to examine the general course of legislation, for very little of that is intended to affect the courts of justice. If we leave out of the account the various attempts at codification or revision of the laws, and examine the annual and biennial volumes which record the acts of Congress and of our State Legislatures, we shall be surprised at the very limited space which in such a volume is occupied by legislation strictly appropriate to improvements in the criminal law, or the law of private rights, or to securing the proper enforcement of such laws. Appropriation bills, acts and resolutions of a purely partizan political character, statutes creating corporations, private acts for the benefit of individuals, laws which are often mere

jobs, carried through by reason of the money which somebody expects to make out of them, fill not only the statute book, but occupy a much larger proportion of the time of the legislative bodies. But I design to confine myself to the consideration of legislation which concerns the organization of the courts and the methods by which the business of the courts is conducted, and I use the word Legislation in its larger sense, as including both Statutory and Constitutional law.

For the first fifty or sixty years after our forefathers had established our national individuality and independence, they and their immediate successors were too much engaged in consolidating, securing and regulating the general framework of political government, to give much attention to the modes by which private justice was to be regulated. In the absence of any surplus wealth to litigate about, in a country where that wealth was mainly in the ownership of the soil, and the inhabitants therefore essentially rural; at a period when by reason of the virtuous character of the people crime was rare, and personal integrity so common that only its absence was noticeable, the organization of the courts, and the modes of procedure to which they had long been accustomed, were deemed sufficient.

The first innovation in these matters which calls for attention is the change in the tenure of office, and in the mode of appointment of the judges. The life tenure of office for the judges has always been regarded as one of the most valuable results of the Revolution of 1688 in England. For while their appointment, and their removal from office, were both prerogatives of the Crown, experience had shown that they were not to be relied on by the subject, in any contest between him and the appointing power. The independence of the judiciary, which has been the theme of such abundant eulogy with Englishmen, meant therefore independence of the King. But when our people, instructed by the growing strife of party politics, had learned to extend the principle of election by the people to all the legislative and executive departments of the Government, and the popular but deceptive doctrine of rotation in office had taken root among them, it was hardly to be expected that the judiciary would remain the solitary exception to the universal application of those

principles. It was said very plausibly that the life tenure of office had been adopted as a protection against the monarch, and since there was no monarch in this country, but the people themselves were sovereign, there was no need to protect the people against themselves, and the judges, like all other public servants, should be made to feel a proper sense of accountability to their masters, by the necessity of a frequent renewal of their appointment. The agitation of this subject led in most of the States to such changes in their fundamental law, that the judges were appointed or elected by the Legislatures.

I do not say that this mode of appointment was adopted by all the States, but I speak now as I must hereafter speak on these subjects only of the general or prevalent course of affairs.

Of all the depositories of political power in this country, from the people to whom the most extended right of suffrage has been given to the executive whose power is under least restraint, the legislative bodies, jointly or singly, are the most unfit to be trusted with appointments to office. And notwithstanding the very excellent manner in which this power has been exercised in one or two small States, notably Vermont, in the appointment of judges by the Legislature, annually or biennially, I fearlessly appeal to the experience of the age and the sentiment of the people as shown by the more recent revisions of their State Constitutions, in support of this proposition.

My earliest recollection of a phrase, since become common in the mouth alike of the patriot and the demagogue, I mean the words "bargain, intrigue and corruption," is in reference to that charge against the House of Representatives of the National Congress, in its election of a President of the United States.

When Mr. Clay, the Speaker of that House, after successfully exerting his powerful influence in favor of Mr. Adams, was made by Mr. Adams the premier of his cabinet, the belief that this was the result of a previous bargain was so strong, that the words I have mentioned became the battle cry of a generation, and the source of power of a great political party, which governed the country for that time, and may do so again. Let it be observed that it was not the evidence of an actual bargain which produced such results on the public mind, for there was

none. Nor do I think that any candid mind now believes such a bargain was made; but it was the great probability that men, placed in the position of these two, would be governed by selfish and improper motives, and would, therefore, make the bargain suggested by the situation, and by their subsequent conduct.

When the election of judges by the Legislatures of the States became the accepted theory of American statesmanship, the appointment of many other officers was vested in the same bodies. Men were to be elected at the same session; senators, judges of the higher and lower courts, presiding officers of the two houses, and, perhaps, many other places were to be filled. Here was a wide field for combinations, for exchanges of votes and influence, temptation for the use of money and the appliance of all those corrupt, but efficient means, by which bad men secure power at the expense of the general good.

This system has given rise to the expressive term, "log rolling," as applicable to that and to other forms of legislative action. It comes from the customs of the early settlers in clearing the trees from the soil which they intended to cultivate. When the trees were all felled and cut into logs from ten to twenty feet long, they were gathered into large piles and burned up to get them out of the way. This piling business required more force than was at the command of one farmer, and so it became the custom, as it did in house-raising, corn-husking, and other similar matters, that when the settler was ready for the performance, his neighbors came, and putting their joint forces together, the logs were soon piled ready for the fire. He in turn helped each neighbor when needed, and so these neighborhood meetings came to be called "Log-rollings." It is aptly expressive of the combination of forces in a legislative body, by which one member or set of members who have a particular object to accomplish, secures the aid of others, indifferent in that matter, by promising to assist in matters in which the others are interested. This log-rolling system found a fruitful theatre of operation in legislative appointments to office, and was soon transferred to other subjects of legislation, in which members or their constituents had local or individual interests, often at variance with the general welfare.

But the American people with that political sagacity which so eminently distinguishes them, were not slow to perceive the evils of this system. In the exercise of frequent revisions and amendments of their State Constitutions, they have been engaged for the last quarter of a century in striking at this log-rolling practice. Hence we see in all the more modern Constitutions, provisions, that all laws shall have a uniform operation; that every statute shall have relation to but one subject, which shall be expressed in its caption; that taxation shall be uniform and equal; that private corporations shall only be organized under a general law, and others of a similar character, all of which are aimed at this evil of log-rolling, and thus far with only limited success.

One of the earliest of the constitutional amendments was the transfer of the election of judges from the Legislatures to the people by popular vote. Whether this was the result of the growing distrust of legislative bodies, or the general tendency of public opinion to reduce everything to the test of popular suffrage as far as possible, it is difficult to tell. No doubt each motive had its influence. But what we are principally concerned about is the effect of this mode of appointment, the one now generally in operation, upon the efficient and sound administration of Justice in the Courts. Those who have given the subject much thought are divided between this mode and a return to the old one, of nomination by the executive and approval of the more conservative branch of the Legislature. The former mode has not been in operation long enough to enable a careful and reflective mind to arrive at a satisfactory opinion upon it. It has worked so much better than the legislative method, that it has established that claim at least to favor. It is also to be considered that it has been adopted almost exclusively in connection with short terms of office, about the evil of which there can be no question, so that these two principles, which have no necessary connection, have very generally been mingled in the consideration of the subject.

As to the tenure of the office it is satisfactory to know that public opinion has undergone and is still going through a very decided re-action.

There are seven States in which life tenure prevails. In one the term is twenty-one years,

in another fifteen, in another fourteen, in three it is twelve, and in two it is ten. In the remainder it is six and eight years, with three or four exceptions. So in regard to the manner of appointment. Three States appoint by legislative election; seven by the Governor and Senate, and twenty-eight by popular election. In all these cases I speak of the higher courts of the States.

It must be confessed that the party conventions, which for years past have proposed the only candidates for office who have any chance of election, have been much more careful in their nominations for judicial offices, than in those of any other class. How long this exceptional case will last, or how soon these offices will be subjected to all the degrading forces which are brought to bear in putting before the people candidates for offices more purely political, it is impossible to tell. If the elections for judicial offices were held at times when no other offices were to be filled, it would go far to remove the worst evil of the present system. This has been done by the State of Wisconsin, and as proof of what has just been suggested, it may be stated that recently where two judges of the Supreme Court were to be elected at one time, the convention of each political party called to nominate candidates only nominated one, leaving one to the other party with the result of securing two judges every way fitted for the place.

But however this mode of selecting judges may operate among a people mainly rural, there are well-founded fears of its results in cities where the criminals, against whom a judge must enforce the law, if it is enforced at all, exert a very powerful influence in nominating conventions as well as in the final vote. And we are not without warrant in the experience of more than one large city to justify these fears.

But apart from abstract reasoning on the subject we have an element of comparison in the different modes by which the State and the Federal judiciary are appointed. The latter under the Constitution of the United States have always been appointed by the President, subject to approval by the Senate; and I apprehend that very few of the statesmen of this country, however democratic their general views of government may be, have any wish to

adopt for the judges of the United States the system of popular election.

The dependence of the judiciary on the appointing power is not dangerous only when the appointment is by a monarch. It is much to be doubted if dependence on the vote of the populace is any less so if the power is exercised at short intervals. The passions, the prejudices, the hasty impulses of the people, when brought to bear on the judge, are as likely to be unfavorable to the defence of innocence in criminal prosecutions, and to the establishment of an unpopular claim of private right, as the occasional exercise of that influence by a king or a governor. The interest which great corporations or large classes of men in other instances have in the rules by which their cases are to be governed in the court, or in the manner in which individual causes are decided, is very likely to be understood and felt by a weak or timid judge, who remembers the power they can exert on election day.

Having traced the cause of legislation in this branch of our subject, let us inquire for a moment what it ought to be.

The primary object, the highest purpose to be attained in the organization of the courts, as regards these members, is to secure honesty, capacity, and independence, exemption from all improper influences.

I do not think the question of the source of their appointment so important as a means of securing these qualities, as stability in the tenure of office, and in the composition of the court, and reasonable compensation of the judges. In both of these respects the tendency of modern thought as shown in legislation, both constitutional and statutory, is in the right direction. In some of the States the salaries are perhaps sufficient. In New York, if not all they ought to be, they are much more liberal than in most of the States. The Congress of the United States has been generous to the Supreme Court since I have been a member of it. In the sixteen years of my service, they have twice increased the salary, bringing it from \$6,000 to \$10,000, and have provided for every judge not only of that court, but of all other Federal courts, who has reached the age of seventy, and has also served ten years, a retiring pension equal to his salary. But while they have been liberal to the members of the

Supreme Court, they have been niggard and unjust to the judges of the District and other Federal courts. As regards the judges of the District courts, the hardship is very great. With one or two exceptions their salary is only \$3,500 per annum, and some of them, notably the two whose courts are held in St. Louis and Chicago, if they had to pay rent for the houses in which they lived in the city, and live in the style of gentlemen of their standing in the world, would find the salary insufficient to support the man alone, to say nothing of wife and children. It is a shame to this great government that it should be so. Every judge who has the power and whose duty it is to decide upon the right to life, liberty and property, should be provided with a support which would at least not suggest temptation and would leave him free from immediate anxiety concerning the means of comfortable existence. Whether it is wiser to make the office one for life, or of a period so long that reasonable stability in the court, and security in the office is guaranteed to the judge, I will not undertake to say. But it is a fair subject for consideration in future legislation, and there can be no doubt that such advances can be made and ought to be made, as will secure compensation and stable tenure in office.

On the other hand it must be confessed that the means provided by the system of organic law in America for removing a judge who for any reason is found to be unfit for his office, is very unsatisfactory. With the exception of a few States which have retained the old fashioned mode of removing an officer by an address to the governor of two-thirds of each house of the Legislature, impeachment is the only remedy. The constitution of the United States, which in this respect is the model on which those of the States are formed, declares that the President, Vice-President, and all civil officers shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors; that the trial shall be by the Senate on articles preferred by the House of Representatives, and that no person shall be convicted without the concurrence of two-thirds of the members present.

What the "high crimes and misdemeanors" are, for which the remedy may be invoked, remains unsettled to this day. It was the most

important question in the most important State trial ever held in this country, namely, the impeachment of President Johnson, and was left there as undecided as ever. There were those who believed that some specific penal offence, defined by statute, must be proved, or there could be no conviction; and on this ground several of the senators who voted for acquittal rested their judgment; while many of those who voted for conviction, constituting, perhaps, a majority of the Senate, were of opinion that there might be such dangerous exercise of unauthorized power, such total refusal to perform, and such moral delinquency in regard to the duties and requirements of the place as would amount to a high misdemeanor in the sense of the Constitution. Whichever view of that point may be right, it is very certain that after the experience of nearly a century, the remedy by impeachment in the case of judges, perhaps in all cases, must be pronounced utterly inadequate. Besides the main difficulty of deciding in each case whether the charge, if proved, is an impeachable offence, there is almost equal difficulty in obtaining a two-thirds vote in a body political rather than judicial in its character, liable to changes in its constituency during the usual delay of such a trial, and open from its very nature to appeals to party prejudice, to compassion, and to personal friendship.

It is not easy, however, to suggest a better remedy. The tribunal would be rendered more efficient and more safe by a specific definition of the causes of removal. There are many matters which ought to be causes of removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.

So, also, there are offences against the law, or conduct which might be made so, that peculiarly unfit a man for the office of judge. A vile and overbearing temper becomes sometimes in one long accustomed to the exercise of power unendurable to those who are subjected to its

humors. But I think the experience of observers will bear me out in saying, that habitual intoxication is of all this class of disqualifications the most frequent.

Two things may be suggested as worthy of consideration in any effort to amend Constitutions on this subject, namely: that the causes for which a judge may be removed from office shall be described with the same precision as that which is used in defining indictable offences. Second, that whatever may be the nature of the court before which he is tried, the facts of his guilt of the impeachable offence, or disqualification charged, should be found by a jury or some similar tribunal. It is however to be remembered that a judge should, in the exercise of his functions, be trammelled as little as possible by fear of consequences to himself, and in view of the resentments of disappointed suitors the providing for removal should not be made too easy.

As occupying an important place in the machinery of the courts, the jury is next entitled to our consideration. No institution which we have inherited from our ancestors has been as little disturbed by legislative action as trial by jury; and none seems so firmly fixed in the affections of the people with all its accessories. It is the theme of the popular orator when all else fails, and a comparison of our happy condition with that of the benighted nations of Europe would fail to satisfy the public taste, if it did not dwell with emphasis on our ancient system of trial by jury, as the palladium of our liberties. Still there are indications of dissatisfaction. Illinois, by her most recent Constitution, permits the Legislature to abolish grand juries. Colorado does the same. Nevada allows three-fourths of the jury to render a verdict. Perhaps this last is a valuable innovation. It requires all the veneration which age inspires for this mode of dispensing justice, and all that eminent men have said of its value in practice, to prevent our natural reason from revolting against the system, and especially some of its incidents. If a cultivated oriental were told for the first time that a nation, which claims to be in advance of all others in its love of justice and its methods of enforcing it, required as one of its fundamental principles of jurisprudence, that every controversy be-

tween individuals, and every charge of crime against an offender, should be submitted to twelve men without learning in the law, often without any other learning, and that neither party to the contest could prevail until all the twelve men were of one opinion in his favor, he would certainly be amazed at the proposition. Nor have the European nations differed much with him in their estimate of trial by jury. It has been well understood and received the careful consideration of continental jurists for a great many years, without being adopted by any of them, in the form that we have it from England. Many attempts have been made to introduce it in some modified shape; but I think it safe to say that it has not in its essential Anglo-Saxon feature met the approval of any people except those of that race. In the days when kings exercised arbitrary power, the jury was among the sturdy, liberty-loving Englishmen a valuable barrier against oppression by the Crown. But in this country, where the people are sovereign, the jury is too often the mere reflection of popular impulse, and the safety of an innocent man is more frequently found to depend on the firmness of the judge than the impartiality of the jury. Still it is probably wise that no man shall be convicted of an infamous crime until twelve fair-minded men are convinced of his guilt. I am also forced to admit, however, that even in civil cases my experience as a judge has been much more favorable to jury trials than it was as a practitioner. And I am bound to say that an intelligent and unprejudiced jury, when such can be obtained, who are instructed in the law with such clearness, precision, and brevity, as will present their duty in bold relief, are rarely mistaken in regard to facts which they are called upon to find.

Since public opinion is not ripe for a candid consideration of the abolition of the jury system in civil cases, it is the part of wisdom in the legislator to make it as useful as possible. To this end the doctrines of the residence need other qualifications and disqualifications of jurors and amendment. The principle of trial by a jury of the vicinage was founded originally in the idea that the neighbours were better qualified to decide the controversy, by reason of their knowledge of the character of the parties and the circumstances of the issues to

be tried. In modern times we have adopted the rule to exclude a man from the jury who knows anything of the case, or has an opinion of its merits, searching in some instances for weeks to find a man so ignorant or obscure that he has never heard of a case which has attracted universal attention, and does not know the most prominent public character in his neighbourhood. The evils of these restrictions have challenged public attention of late years. I can see no reason at this day for a trial in the vicinage, nor for restricting the area from which the jury is to be taken by county lines, and still less for refusing a man otherwise well fitted for a juror, because he has read an account of the famous case in the newspapers. In these respects, as well as in the number of the jury, which is too large, and in the requirement of unanimity in the verdict in civil causes, there is a fair field for judicious legislation.

An essential element of any system of administering justice is the law of evidence. The rules by which testimony offered in a suit is to be admitted or rejected, and the probative force of the different classes of evidence admitted, must always have a controlling influence on the verdict of the jury or the judgment of the court.

The common law of evidence was in many respects a very artificial system, and probably more restrictive in the rules which admitted testimony than any civilized code of laws. And while the courts have felt the evil of many of these limitations upon the use of testimony, calculated to throw light on the issue, they have been comparatively helpless by reason of their obligation to follow the established law of the case. In this matter, also, legislation has made no progress until a few years back. The exclusion from testifying of the individuals who were likely to know more of the matter in controversy than all others because they are parties to the suit, or are interested in the result, is still the law of some of the States though abolished now by most of them.

It was until recently the universal law of this country that the mere contingent liability to costs rendered the party liable incompetent to testify in the suit. Wherever the rule of exclusion on account of interest or of

being a party to the suit has been abolished, it has met the approval of judges and lawyers, with rare exceptions. The only question yet open on that subject relates to its application to criminal cases. Many States of the Union now permit a man to testify who is on trial for a criminal offence. In most of them this must be voluntary on his part, and he can remain silent if he chooses. But it has been thought proper in such cases that the jury shall be instructed that his silence is to raise no presumption against him, as it might do if he refrained from giving explanations which the situation seemed to require. It may be doubted, however, if the charge of the court in such cases will be very effectual.

The exceptions to the law excluding hearsay evidence, which have been somewhat increased by the courts, might profitably be further enlarged by legislation.

The proof of character, whether good or bad, should, in my opinion, be admitted in many cases, both for and against the party, where it is now excluded. On a charge of crime, or an issue of fraud, which of itself proves the man, if guilty, to be a very bad man, it is usual to reject the light which his previous character, whether good or bad, will throw on the probability that he would do the act charged.

Without enlarging on the subject, I am of opinion that in criminal causes the French system of repeated and very free preliminary examination of the prisoner, in the presence of a judicial officer, in which questions are put and answered with great freedom, as the facts are developed, in which the accused has the fullest opportunity of prompt and early explanation, and is held responsible for its absence, when the examination is postponed and resumed as new information is obtained bearing on the guilt or innocence of the party, is much more likely to relieve the party, if innocent, of the disgrace and trouble of a formal trial, and to produce conviction in case of guilt, than our artificial strait-laced law of evidence permits. It is the boast of the common law that it protects the innocent at all hazards, and that it is better that many guilty should escape than that one innocent man should be punished. Yet I entertain a very strong conviction that, leaving out of the account prosecutions for offences purely political, fewer men are wrongfully

punished, and fewer guilty ones escape, under the French than under our system of criminal procedure. There is in the law of evidence an inviting field for the Jurist and the Legislator. The book of Mr. Justice Appleton, of Maine, and the works of Mr. Stephen, are encouraging in this direction; and an examination of Mr. Bentham's labors on this subject would well repay the time so expended.

Looking at such legislation as affects the methods by which justice is administered in the courts, the modes of procedure in them, it will be found that the changes have been very important.

In several of the New England States, and in the State of Pennsylvania, courts of Equity, as distinct from Courts of Law, have always been unknown; but within the last thirty years they have conferred, to a limited extent, equity jurisdiction on their Common Law courts. It is not within the scope of these remarks to discuss the sufficiency of the courts of common law, as we received them from our English ancestors, to meet the demands of remedial justice. I take it that the struggle of the two States of Pennsylvania and Massachusetts, to do without the principles of the equity courts, in which struggle they finally yielded to the necessity of adopting them, is conclusive on that point. But it came very soon to be understood, that while the system of chancery law was a necessary element of our jurisprudence, it was not indispensable that there should be a separate court for its administration.

The States accordingly began very early to dispense with chancellors, and to require the judges of their courts of law to act also as chancellors. But while this was done by virtue of the same commission, and the style of the court was the same, in which the remedies were administered, there was a separate docket for each class of cases, the distinctive modes of pleading and practice were kept up, and the courts were in fact courts of law and courts of equity.

But about the time that Massachusetts and Pennsylvania had come to recognize the necessity of the principle of equity, to the completeness of their system of jurisprudence, the State of New York, which has taken the lead in all these innovations, or improvements, as you may

choose to call them, began to consider, whether the principles and methods of courts of equity were necessarily so antagonistic to those of the courts of law, that they could not be combined and administered in the same forum and as part of the same system of legal procedure.

They said, if A has the legal title to a tract of land, and sues B to recover possession of it, and B has a valid equitable right to the land and to its possession, why must B submit to let A recover judgment for its possession in a court of law, and then file a bill in chancery to obtain from A the legal title, and for a perpetual injunction against A's judgment? Why, since the same judge, sitting in the same court, must try both the action at law and the suit in chancery, shall he not do it in one suit, thereby saving both time and money to the litigants? The answer to these questions, based as it was on the want of flexibility in the forms of action at common law, led to an enquiry into the value of those forms, which came to be very much disturbed. And no wonder this was so. Actions at law were divided into actions of tort and actions of contract. These again were subdivided into specific forms, and however good or well-founded a plaintiff's right of action might be, he was defeated if he had mistaken the form in which he had brought it. If it was detinue when it should have been debt, or trespass when it should have been trespass on the case, he was beaten, though his right to recover the sum, or thing claimed, was made clear during the progress of the suit. And so if he had brought an action at law, the subject-matter of which was only cognizable in equity, he was when this was ascertained, at whatever stage of the litigation, and however clear his right to relief, turned out of court with costs, and compelled to bring another suit or abandon the assertion of his right.

[To be concluded in next issue.]

GENERAL NOTES.

A MAHOMETAN IN COURT.—A Toronto report states that on the 7th instant, a Mahometan appeared before the Police Court. It is said to be the first instance on record. The man, who is a Circassian, goes by the English name of Henry Jackson. He appeared against Na-

thaniel Hammond, a hotel-keeper, for, as he alleged, obtaining from him under false pretences \$150 in cash and two stoves. The case was adjourned in order that a book of the Koran might be procured whereon to swear the complainant.

GREAT LAWYERS AT DRILL.—Ellenborough and Eldon were both turned out of the awkward squad of Lincoln's Inn corps for awkwardness. The former's attempt at this military training gave him an opportunity to utter a memorable jest. When the drill sergeant reprimanded the company for not preserving a straiter front, the great judge replied, "we are not accustomed to keeping military step, as the indenture witnesseth."

A FEMALE ATTORNEY IN DIFFICULTIES.—Mrs Belva Lockwood has succeeded in obtaining admission to the Washington bar, but finds this is not a passport to other legal fraternities. A short time ago she entered the Court of Judge Magruder, of the Seventh Judicial Circuit of Maryland, and there attempted to act as an attorney. But the court would not permit her to do so, and lectured her after this manner: "God," said the judge, "has set a bound for woman. She was created after and is a part of man. The sexes are like the sun and moon moving in their different orbits. The greatest seas have bounds, and the eternal hills and rocks that are set above them cannot be removed." When the court finally adjourned Mrs. Lockwood attempted to address the ladies and gentlemen who were present, but a bailiff prevented her from making any speech in the court room.

HORSEMONGER LANE GAOL, which has just been closed under the Prisons Act recently passed, was built in 1798, and is famous as the place of confinement not only of criminals and debtors, but of political and other offenders also. It was here that in 1803 Colonel Despard, with six of his companions, suffered death for conspiring to "overturn the Constitution and destroy King George III and the rest of the Royal Family." Here too Leigh Hunt spent two years of his imprisonment, and more recently Colonel Valentine Baker and the Rev. Arthur Tooth have been accommodated within its walls.

The Legal News.

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TRADERS CONTESTING WRIT OF COMPULSORY LIQUIDATION.

We inserted last week a note of a decision in the case of *Anderson v. Gervais*, in which the Court held that it had no jurisdiction to permit a trader, against whom a writ of compulsory liquidation had issued, to continue his trade while the contestation of the attachment was pending. This decision was opposed to one rendered in 1876 in *Fisher v. Malo*, Rainville, J., in which it was held that the Judge may, under special circumstances, permit the insolvent to continue his trade. In that case the writ of compulsory liquidation had been quashed, but an appeal had been taken from the judgment. The Court held that the judgment had the effect of giving back to the trader the possession of his effects, and he was allowed to continue his trade while the case was pending in Review. This decision has been followed by the Court of Review in *Anderson v. Gervais*, the decision noted last week being reversed. The Court of Review holds that a trader may be allowed to continue his business, pending proceedings to set aside a writ of compulsory liquidation, on giving security to the full value of his stock.

LIABILITY OF PROTHONOTARIES.

In connection with certain recent proceedings affecting an insolvent estate, an interesting question has arisen as to the liability of prothonotaries in issuing special writs, such as *saisies-arêts* before judgment, or *saisies-conservatoires*. Is a prothonotary bound, on the production of an affidavit, to allow the writ to issue, or is it his duty to examine the affidavit, and determine whether the allegations are sufficient to justify the demand? And again, if it be assumed that he is bound to examine the affidavit, is he responsible for the damages which may have been caused by a seizure based on an insufficient affidavit?

These important questions received considerable attention in a case decided by the Superior Court in Montreal some years ago, and affirmed

in appeal. We refer to the case of *McLennan et al. v. Hubert et al.*, in which the joint prothonotary was sued in damages under the following circumstances: A sailor, named Marcile, claimed the sum of \$7.25 to be due to him for wages, by one Couvrette, captain of a barge, and he made an affidavit of which the following is a literal translation: "That the defendant is indebted to him in the sum of seven dollars and twenty-five cents, being for wages as sailor on board the barge bearing the name of —, and that said barge is on the point of leaving the Port of Montreal, to go to the United States of America, and that without the benefit of a *saisie arrêt* before judgment to seize and arrest the said barge, its equipment and cargo, the plaintiff will lose his debt and suffer damage." This affidavit was presented to Mr. Papineau, one of the defendants, as joint clerk of the Circuit Court, on the 4th September, 1871, and thereupon he ordered the issue of a writ of *saisie arrêt* before judgment, commanding any bailiff of the Superior Court "to seize and arrest all the goods, debts and effects of Albert Couvrette, barge captain, of the Parish of Ste. Cecile, District of Beauharnois, and particularly a barge and its equipment and cargo; said barge known under the name of "Guard," presently in the Port of Montreal." The seizure was made while the barge "Guard" was one of ten which were being towed by a steamer through the Lachine Canal, and a detention of ten hours was caused to the whole tow. This, it was established, entailed a loss of about three hundred dollars on McLennan & Co., the proprietors of the barges, viz.: twenty dollars for each barge, and one hundred dollars for the steamer. The attachment was quashed by the Court, on the ground that the affidavit did not contain the essential averments required by law for the issuing of a writ of attachment, and the proprietors of the barge then gave the prothonotary notice of an action to recover the damages occasioned to them by the seizure, alleging that the prothonotary had acted "illegally and without reasonable or probable cause."

The action was met in the first place, by a demurrer, alleging that the prothonotary and clerk are bound, on the demand of the plaintiff's attorney, accompanied by an affidavit *serieuse et de bonne foi*, to issue writs of *saisie arrêt*, before

judgment, and others of the same nature, and that they cannot constitute themselves judges of the sufficiency or insufficiency of such affidavit. The demurrer was dismissed, Mackay, J., considering the declaration if proved, sufficient to justify a judgment. From this decision, therefore, it would appear that an action of damages lies for the issue of special writs "illegally, and without reasonable or probable cause."

The defendants also pleaded to the merits, that at the time of the seizure, the question as to whether a seaman had a right to obtain a *saisie conservatoire* for his wages, due on the last voyage, was controverted; and that the defendants had acted in good faith, "*de bonne foi et sans négligence ou impéritie*." At the *enquête* two of the prothonotaries were examined. One, Mr. Papineau, who has since retired from office, disclaimed any discretion in the matter. He said: "We consider the affidavit as the work of the deponent and the lawyer, and we do not read it, considering ourselves responsible only for the jurat and the manner of administering the oath." Mr. Hubert, however, who was also interrogated as to the practice, replied: "Since I have been one of the prothonotaries, I have never, as a general rule, received affidavits for special writs, such as *saisie arrêt* before judgment or revendication, without examining and reading them."

The Superior Court, Torrance, J., dismissed the action, the principal motive being: "considering that the plaintiffs have failed to prove that the *saisie-arrêt* before judgment set forth in the declaration, was issued without any reasonable or probable cause." And the point was further elucidated by the following remarks of the learned judge in pronouncing the judgment: "The function which the prothonotary performed here, may be regarded as a *quasi* judicial one, and in a case of *Carter & Burland*, the Court has already to-day decided that a magistrate is not liable where there is no malice or misconduct on his part. Broom's *Maxims* show that even inferior magistrates cannot be called into question for a simple error. It is better that an individual should occasionally suffer wrong than that the course of justice should be impeded by constant apprehension on the part of those who have to administer it. The question raised here as to the

issue of the *saisie-arrêt* is one upon which different judges have held different views, and is it to be said that a prothonotary is liable because he does not refuse to give out a warrant of *saisie-arrêt* on what at least appeared to be a sufficient affidavit?"

The case was taken to appeal, and very ably argued by Mr. Girouard, on behalf of the appellants. It was urged that Mr. Papineau in issuing these special writs, without even taking the trouble to read the affidavits, was guilty of gross neglect, for which, if he was a mere ministerial officer, he was answerable; and, on the other hand, if it were held that he was acting in a judicial capacity, he had exceeded his jurisdiction, and should likewise be held answerable. The judgment, however, was affirmed; the Court holding that although the Prothonotary had apparently acted without sufficient circumspection, yet he had not acted in bad faith, and was, therefore, not accountable.

The principle deducible from this decision seems to be, that while the prothonotary is bound to exercise a certain degree of care, he will not be held liable in damages, unless bad faith or very gross carelessness be proved against him. Perhaps this is the safest rule that could be laid down. If prothonotaries were to be held liable for erroneous judgments, the inconveniences arising from their refusal to act, might be greater than those proceeding from ill-advised or hasty action. They would in cases of difficulty require time to deliberate, and to consult authorities and counsel, and the ordinary difficulties of overcoming official *inertia* would be vastly multiplied. We may remark, in conclusion, that those who wish to see in what cases judges, or those acting in a judicial capacity, are responsible, will find a full examination of the question in the case of *Lange v. Benedict*, ante, pp. 337, 341.

According to statistics published in the *Boston Commercial Advertiser*, the number of bankruptcies filed under the late bankrupt law, from the time it went into operation, June 1, 1867, to August 31, 1876, was 103,005, of which 15,151 were in the Eastern States, 24,534 in the Middle States, 22,780 in the Southern States, 40,096 in the Western States, and 433 in the District of Columbia.

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, Nov. 23, 1878.

TORRANCE, J., RAINVILLE, J., JETTÉ, J.

ANDERSON v. GERVAIS, and GERVAIS, Petitioner.
*Compulsory Liquidation — Insolvent Continuing
 Trade Pending Contestation.*

Held, that the Court or Judge may permit a trader against whom a writ of compulsory liquidation has issued, to continue his business pending the contestation of the writ, on his giving security for the value of his stock-in-trade and other assets.

The defendant inscribed in Review from the decision noted *ante* p. 566, which refused permission to the insolvent to continue his business while the contestation of the writ of compulsory liquidation, which had issued against his estate, was pending.

The Court reversed the judgment, the reasons being recorded in substance as follows:

"Considering that under Sect. 9 of the Insolvent Act, 1875, the writ of compulsory liquidation is subject as nearly as can be to the rules of procedure in ordinary suits, as to its issue and return, and as to all proceedings subsequent thereto before the Court or Judge;

"Considering that under Sect. 16 of the Act, after the issue of a writ of compulsory liquidation, the assignee holds the property of the defendant only in trust, for the benefit of the insolvent and his creditors, and subject to the orders of the Court or Judge;

"Considering that under Sect. 17 of the Act, the defendant, when he contests the writ of compulsory liquidation issued against him, is obliged to furnish the assignee with a statement of his affairs only within ten days from the date of the judgment rejecting his petition to have the writ quashed, and not within ten days from the service; and that under Sect. 20, the assignee, if the writ is contested, can call a meeting of the creditors only after the contestation is rejected;

"Considering that it results from these provisions, that until judgment is rendered on the contestation of a writ of compulsory liquidation, the defendant is not absolutely divested of the possession of his estate for the benefit of his creditors, but the law gives the assignee only provisional possession thereof, subject to revocation in case the writ of compulsory

liquidation is set aside, and that he only holds such property subject to the orders of the Court, or Judge;

"Considering that in such case, and before such adjudication on the merits of the contested writ of liquidation, the assignee can be considered merely as a guardian or depositary, charged with the custody of the defendant's property as well for defendant's benefit as for that of his creditors;

"Considering that in all matters concerning the possession of property seized, the appointment or the discharge of guardians, depositaries or *séquestres*, the Court or Judge has a summary jurisdiction, the exercise of which is limited only by the particular circumstances of the case;

"Considering, in fact, that the defendant in this case has contested the writ of compulsory liquidation issued against him, and that this contestation is still pending;

"Considering that the defendant asks to be put in possession of his property only on giving such security as may be judged sufficient to protect the rights of all interested;

"Considering that the interest of the plaintiff in this cause and the interest of all the other creditors of the defendant in maintaining the seizure of defendant's property, cannot exceed the full value of the defendant's property and assets, and that on such full value being secured by sufficient security, the rights of all interested will be fully protected;

"Considering that to refuse the defendant offering such guarantees the possession of his estate and permission to continue his trade would expose him unjustly to damage, &c."

Judgment reversed, and defendant allowed to continue his trade on giving security for the value of his assets.

Abbott & Co. for plaintiff.

Doutre & Co. for defendant and petitioner.

COURT OF QUEEN'S BENCH.

Quebec, Dec. 3, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER
 CROSS, JJ.

BEAUDET, Appellant; and MAHONEY, Respondent.

Appeal from Circuit Court—Factum.

The appeal was from a judgment of the Circuit Court. A motion was made verbally by

the appellant, that he should not be held to proceed until he had time to file a factum.

The Court did not think the appellant was entitled to succeed on this motion. A factum is not required in appeals from the Circuit Court, unless it be specially ordered, and the Court will not make such order without some cause shown, and particularly on the part of defendant, the effect of such order being to create a great delay. Parties can always make a factum if they desire it.

Motion rejected.

SUPERIOR COURT.

Montreal, Nov. 30, 1878.

JOHNSON, J.

THE ATTORNEY-GENERAL, *Pro Regina*, v. THE MONTREAL CITY PASSENGER RAILWAY CO., & THE TRUSTEES OF THE MONTREAL TURNPIKE ROADS, *mis en cause*.

Street Railway Company—Nuisance—Exercise of powers under Statute.

A street railway company was authorized by Statute to lay its track "along the highways in the Parish of Montreal" leading into the streets of the city. *Held*, that the Company in laying its track inconveniently close to the property on one side of a highway, and thus apparently favoring the property on the other side, had not exceeded its powers, and an action for the abatement of the alleged nuisance was dismissed.

JOHNSON, J. This is an action for the abatement of an alleged nuisance. The Attorney-General says that the City Passenger Railway Company at a certain part of their track, from the church at Coteau St. Louis, to the station of the Quebec, Montreal and Occidental Railway, have abused and acted in excess of their powers, by laying their track too near the property of the plaintiff; so near, in fact, that neither man nor beast can conveniently use the highway along which the railway runs, to the great injury in particular of the estate of the late Stanley C. Bagg. The plea is that the Railway Company has acted within its powers as well with respect to the municipality of Cote St. Louis, as with respect to the Trustees of the turnpike roads, and that they have done no injury to the party whose interests are said to be more particularly affected. The latter part of the plea opened the door to much evidence that I thought irrelevant at the trial, and I said so—and I still think so, for surely if the Railway

Company has acted within its powers, the injury, if any, of an exercise of legal power, should not expose them to take up their track. I therefore do not express any opinion that can affect the result of the case upon the point of injury. The evidence showed that the track was at the place indicated, put very near indeed to the sidewalk—I should say very inconveniently near. It was also in evidence that this eccentric course was detrimental to the estate in question, and very beneficial to the estate Beaubien on the opposite side of the road, because nobody would buy lots to build on when the first step from their front door would expose them to get their toes cut off on a horse railway: and at the same time the extension of the track to that semi-rural locality was a boon to the class of people likely to live there. All this may or may not have resulted, as was more than insinuated, from the personal influence of the opposite proprietor, who appears to have been an officer of the Turnpike Trust; but I think I can only look at the question of power or no power to run this railway along that highway. That depended on the different statutes:—1st. There was the 3rd Vict., c. 31, of the Special Council, which gave the Turnpike Trustees exclusive control of the turnpike roads, of which this is one; therefore, it became necessary for the C. P. Railway Co. to get the Trustees' permission, which was done. Then all that remains is to see that besides the authority of the Turnpike Trustees the Railway Co. had the power to take their track where they have taken it. Their act of incorporation is the 24th Vict., ch. 84; and the fourth section gives the power not only along the streets of the city, but "along the highways in the Parish of Montreal leading into the said streets, and contiguous thereto, or any of them." Although, therefore, this may be injurious to adjacent proprietors, it would be impossible to hold that the exercise of a right, within the limits of the powers conferred upon them, however inconvenient that exercise may be to one or more individuals, can expose the defendants to undo what the law has authorized them to do. The action is therefore dismissed. I have no power to give costs against the Crown, but the law allows me to recommend that they be paid, and I think the defendants are entitled to their costs, and I see besides

that the Attorney-General has taken security to that effect.

Doutre & Co. for the plaintiff.

Abbott & Co. for the defendants.

LACHAPELLE V. BEAUDOUIN.

Action for Aliments—Toit Conjugal—When Wife may refuse to live with Husband.

A wife who has grounds for demanding *séparation de corps* from her husband and an alimentary allowance, may claim an allowance without asking for separation.

The *toit conjugal* is where the husband resides; but if the husband keeps a concubine in the house, the wife is justified in refusing the offer of a home with him.

JOHNSON, J. This is the case of a married woman *commune en biens* with her husband, who still lives in Montreal, but who, as she says, has left the "*toit conjugal*," and she sues him simply for the support of herself and their child. This leaving what she calls the "*toit conjugal*" and going to live in another house is all that constitutes her ground of action. His defence is that she compelled him by her ill-treatment of him and his two children by a former marriage, to go and live elsewhere, and that she keeps the household goods, while he is obliged to find support for the two children and himself, and he nevertheless offers to receive her where he resides. The answer of the wife is one of recrimination, and very serious recrimination. She says he is living with another woman who has taken her place. Now, the first thing I have to observe in this case, is that this is a court of law. It is not a place where parties in any suit, and much less where a husband and his wife, can be permitted to come merely for the sake of saying to each other disagreeable things. We must have distinct notions of what the legal obligations of these two persons to one another really are; we must see a plain principle upon which we are asked to exercise our authority; and nothing precise, no point, no rule, has been distinctly urged by the counsel on either side. I must say I always thought that what this poor woman or her adviser calls the *toit conjugal*, was the husband's roof there he could make her reside; not her roof where she could make him reside. His leaving one spot, and moving to another, might have the effect of making her follow him; but I never heard that it meant he

was to come back again at her bidding. In one word, the obligation of the husband is to receive her and supply her with all the necessities of life, according to their means and condition. This is the text, the very words of the Code (see article 175). More than that, by the same article, "she is obliged to live with her husband, and follow him wherever he thinks fit to reside." Therefore, unless there has been a refusal on his part to do so, she has no action. It must be observed that here she is not asking for a separation, which, no doubt, desertion and adultery, if they are truly alleged, might give her a right to get. The extent of the defendant's obligation is to receive and support her at his house; and there is no refusal, it is said, and therefore no right of action. As to the special answer and the evidence of adultery, that, it is contended, cannot be regarded—and I see there was an objection made to such evidence. In an action for *aliments*, it is urged, she cannot prove adultery; it is irrelevant. If she can't live with her husband, let her take an action *en séparation*. That fact does not give her a right to *aliments*—it gives her only a right to separation. That, at first, seems the sense of the text of the authorities, no doubt; but I will never consent to make an application of authority that seems to me absurd in any particular circumstances. The Code, no doubt, and Pothier (see C. C., Art. 175; and Pothier, Marriage, Nos. 381-2-3), seem to say to this woman: "You are obliged to go and live with your husband." He has even an action to compel her to do so; and she cannot oppose any *mauvais traitements* on his part. That is, no doubt, the law; but it seems to me, in the first place, as regards the mere text of the law, I am obliged to find a meaning in it, and to give it a reasonable application; and I hardly see how, if she can ask for a separation and its concomitant—the means of support—she cannot content herself with asking only a part of what the law gives her—that is, merely the means of support—under circumstances which he has forced upon her. But more than that, when she is told:—"You are obliged to go and live with your husband," she answers substantially:—"He has no home to offer me;" for it amounts to that, if what she says is true, and unless she has the faith of a Mormon. Therefore, though the husband's plea is good to that extent, where he

offers her a home which she is obliged by law to accept under ordinary circumstances, we must see and apply to this case what is Pothier's meaning when he says that if the husband brings his action to make his wife come and reside with him, she cannot oppose his *mauvais traitements*. Pothier, to some extent, discusses the circumstances under which she can refuse; but does not mention the circumstance that arises here. Demolombe, however, discusses Pothier—see Demolombe, vol. 4, Nos. 95, 96, 97—where the whole subject is treated, and from the element in the husband's obligation to treat his wife "*maritalement*," he deduces her exemption from co-habitation with him while he keeps a concubine in the house. I must, therefore, look at the evidence on this head, which I consider relevant as an answer to his offer of a home. There is only one witness, a Mr. Monette, who speaks of it, but there appears no doubt of the fact, and the witness says he knows both the defendant and the woman who lives with him as his wife perfectly well; therefore, I think the wife has a good answer to the defendant's plea, and the marriage not being denied, she must be supported by her husband, and under the proof of his means the judgment will be for \$16 a month, including the child of the marriage, payable in advance, with costs of suit. The proof is altogether in favor of the wife's good conduct while they lived together.

Vanasse for plaintiff.

F. L. Sarrasin for defendant.

MR. JUSTICE MILLER ON LEGISLATION AFFECTING THE ADMINISTRATION OF JUSTICE.

(Continued from p. 576.)

A very distinguished friend of mine, a former Associate of the Bench of the Supreme Court, told me this story: His father died when he was very young and left him some \$20,000 in personal property, which the executors of the will sold, and they used the money. When he became of age he sued these executors and their sureties in Chancery for an accounting, and for the amount due. The case came to the Court of Appeals of Maryland, which held by a majority of one, that a suit in Chancery could not be maintained, but his remedy was at law. He then brought his action at law,

which also came into the Court of Appeals, whose membership had been changed, and which now held that the proper remedy was a suit in Chancery, for an accounting, and after that an action at law might be sustained on the bond. Yet this gentleman is very hostile to the system of procedure by which the principles and remedies of both law and equity are applied in one forum and in the same action as far as they are appropriate to the case.

I am quite aware that in the gradual approach which I have been making to the subject of the Code of Practice or Code of Procedure of this State, the main features of which have been adopted by the Legislatures of two-thirds of the States and Territories of the Union, I am coming to a subject in which there is still a wide difference of opinion; and in regard to which many of the ablest lawyers of this and other States differ with me wholly. Not only so, but I am sensible that it is a sore subject, and one in regard to which men have become partisans with a zeal almost deserving the name of bigotry. But I should have to abandon the rule of a life-time if I did not on this, as I have on all other occasions, express the material convictions of my mind on a subject which lies directly in the pathway of appropriate discussion.

The object of all pleadings in the courts, the object of the courts themselves, is to ascertain the truth in regard to controverted facts, and the law applicable to those facts. If, abandoning any *a priori* discussion of the superiority of the code system, or the common-law system of pleading, for these purposes, we look to the results as they are seen in the reports of cases decided in the higher courts, I think it will be found that a much larger proportion of cases were argued and decided in those courts on mere questions of form in pleadings, and technicalities in practice, which determine nothing of the merits of the cases, while the old forms prevailed, than since they have been abolished. Many, very many causes went to the appellate courts and were there decided, on purely technical questions as to the form of the action, or the form of the plea, which neither touched nor affected the very right of the matter. And while questions of pleading are even under the code system sometimes carried to the Court of Appeal, as

they must be under any system, I venture to say that taking the volumes of reports of all the States which have adopted the Code, and comparing these volumes as to that class of cases before and since its adoption, its advocates will have every reason to be satisfied with the reform.

There may be those present who will think it a sufficient refutation of this assertion to say: "Look at the volumes of Howard's Practice Reports." One answer to this reference is, that while Mr. Howard calls his volumes "Practice Reports," that term would as fitly apply to any other series of reports as to his. The number of his volumes is swelled by reporting every thing else as well as practice cases. A better answer, however, is found in the fact, that for reasons which I shall give, the new system of pleading has in the courts of New York been far more productive of contests which reach the higher courts than the same system has in any other State where it has been tried.

As I have already said, this State was the pioneer in the introduction of the code system. Here it met its first and fiercest opposition. The very great number of judges who were called to administer it naturally led to differences in construction. All these courts have reporters, and by reason of the complexity of your judicial system almost every section of the Code was made the subject of conflicting decisions.

I take the liberty of saying also, that the principal source of the contests over the Code of Procedure was the hostility of the lawyers and those who then occupied the bench. All of these had been bred as lawyers under a system of pleading very technical, very difficult to understand, which constituted of itself a branch of learning supposed to be very abstruse and very valuable. It was one of the titles to reputation and success in the profession, that a man was a good special pleader. To find, as many of these erroneously supposed, all this learning of a life-time rendered useless was more than human nature could bear with composure.

To see the tyro in the profession, made by this change in the law of pleading, as capable of preparing a good declaration, a good plea,

or a good bill in chancery, at the bar, to see his blundering simple process of amending instead of gratifying his a turned out of court as a tri versary's learning, was very

No system of practice, which man could devise, would at factory results which should the determined hostility that lawyers who had to conform to which had to introduce and Code, itself, being a first att course perfect. It was undoul in its details, and was, there nous. It undertook to provi every exigency of the practice have been wiser, after abolishi forms of action and pleading, a few general rules in their s the courts to perfect the syste cation of those philosophical pleading which are essential to which go to make pleading a the prolixity and minutenes encountered the querulous distr and the hostility of a professio from innovation as from a plagi be wondered that it was unpopu all these disadvantages the gen come to receive the approval of in this State, and I suppose that those who would be willing Code of Procedure is small, even Outside of this State, it has met approval, wherever it has been reform in the law can be expe There were those who opposed tl of milder punishment in the long once punished by death, inci stealing, who thought the abolitio ment for debt was a fatal stroke of contracts. Even now by a sliq conscience in charging fraud, a n not give bail is thrown for an ir into Ludlow street jail, whose c that he cannot pay his debts. Th faith in progress, of whom I ho be one, in the progress of the progress of science, in the pro science of the law, must make up to encounter the opposition of this

exemption to talk with you rather than to deliver an essay for others to read, and if you have enjoyed the listening with half the pleasure I have had in the talking, I shall feel more than compensated for the little time I have been able to bestow upon this effort to stimulate your interest in a noble cause.

THE PATENT LAWS—THE FIRST AND TRUE INVENTOR.

The recently reported case of *Dalton v. The Saville Street Foundry and Engineering Company*, 39 L. T. Rep. N. S. 97, in which the Court of Appeal affirmed a decision of Baron Pollock, is of great practical importance in the law of patents. The case is all the more interesting because it dealt with a question which hitherto had not arisen in a court of law, at any rate in this country. The present action was brought to restrain the defendants from infringing a patent for improvements in machinery granted on the 7th June, 1876, to A, one of the plaintiffs, and B, her assignee. A was widow administratrix of her late husband. The patent in question was granted to her as for a communication made to her by him. In the statement of claim there was an allegation that the invention had been communicated to her by her deceased husband, and that the same was not in use by any other person, but was a new invention as to the public use and exercise thereof within the United Kingdom. The communication of the invention was made to the widow by means of documents found by her among her husband's papers after his death. The defendants demurred on the ground that, on the facts therein stated, A was not, within the meaning of the statutes relating to patents, the first and true inventor of the supposed invention, inasmuch as it was not invented by her, and was not a communication to her from abroad, but by an Englishman residing in England, and that the letters patent were therefore not valid. After an elaborate argument in the court below the demurrer was allowed. Baron Pollock considered, first what was the real construction of the patent itself coupled with the allegation made in the statement of claim. Having come to the conclusion that the communication was made within the United Kingdom, and not in any foreign country, his Lordship remarked :

"The true construction of this case is to be that this is a communication by some other person to the petitioner who is the grant of the patent." It had been inasmuch as the patent had been it ought to be assumed to be. Baron Pollock replied : "Of course is used which is capable of two upon any sound construction the Crown can be supported, it is for the individual, and also for the public, and it will be the duty of the court to grant of the patent. * * * Here is, whether, upon the face of the case, there is any sufficient averment that was the true and first invention within the meaning of the statute, whether upon the other hand it is that she was not the true and first inventor, merely a person who is in possession of the invention which was communicated to her by a person in this country who was the first inventor." The 5th section of the Statute of Monopolies, 21 Jac. c. 3, provides that no statute shall not apply to letters patent for a term of twenty years heretofore granted for the sole working and making of any new manufacture within this realm to the true inventor of such manufacture. The court held that, inasmuch as A was the true and true inventor within the meaning of the statute, the defendants must succeed. The defendants accordingly appealed, but, before the appeal was argued, the arguments in the court above, were briefly referred to a few of the reports.

One of the earliest cases, with reference to monopolies in general, is contained in the Reports, *The Clothworkers of Ipswich v. The Masters and Wardens of the Clothworkers of Ipswich*. The masters and wardens of the clothworkers in question brought an action of debt against the King, who had incorporated them and had granted unto them by charter the exclusive right of requiring proof of their right to trade as clothworkers of Ipswich if they had duly served their apprentices. The case was agreed by the whole court that the King might make corporations, and give power to make ordinances for the regulation of the government of trade, but that the King cannot make a monopoly, for that is against the law of free trade, which is the birthright of every subject.

subject. It was also resolved that, although such clause was contained in the King's letters patent, yet it is void; but where it is either by prescription or by custom confirmed by Parliament, then such an ordinance may be good, *Quia consuetudo legalis plus valet quam concessio Regalis*. Thus the King granted to the Abbot of Whitney the custody of a port which was, as it were, the key of the kingdom, and therefore the grant was adjudged void, such grant being expressly against the statute of Edw. 3, c. 1. Again, the King granted to B that none besides himself should make ordnance for batteries in the time of war. This grant was also adjudged void. The court then touched upon a distinction which has had the effect of making this case frequently quoted in patent cases. "If a man," it was said, "hath brought in a new invention and a new trade into the kingdom in peril of his life, and consumption of his estate or stock, or if a man hath made a new discovery of anything—in such cases the King, of his grace and favor in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or traffic for a certain time." When the trade has become common, the monopoly ceases. Chief Justice Cook put this case: The King granted to B that he solely should make and carry kerseys out of the kingdom, and the grant was adjudged void.

A grant of a monopoly may be to the first inventor by the 21 Jac. 1; and, if the invention be new in England, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within this realm. So that, if it be new here, it is within the statute, for the Act intended to encourage new devices useful to the kingdom: *Edgeberry v. Stephens*, 1 Web. P. C. 35. The reporter's note to this case is to the effect that the decision is in accordance with the old common law; and it has been the uniform practice to the present time (1844) to grant letters patent for such inventions, and the Legislature have repeatedly recognized the principle by granting rewards and exclusive privileges to such authors or introducers. As an instance, Lombe's Patent is cited.

In *Beard v. Egerton*, 3 C. B. 97, which was an action for an alleged infringement of a patent, the defendants pleaded, that by an agreement

made in France between the original inventor and the King of France, the former, for the consideration therein mentioned, assigned the invention to the French Government, and the virtue of the agreement, and by the law of France, the invention became vested in the King of France, who thereby became entitled to vend and publish the invention as well in this country as in Great Britain, concluding—wherefore the said letters patent are void." The court held that this plea was bad in substance, inasmuch as it contained no denial of the allegation that the patentee was the true and first inventor within this realm. It was contended on behalf of the defendants that inasmuch as the letters patent were granted for an invention communicated to the patentee by a foreigner, the subject of a State in amity with this country, they were void, on the grounds, first, that the patentee was not the true inventor within the meaning of the statute, or, if the patentee was a trustee, then that the patent taken out in England by an Englishman in his own name, in trust for foreigners residing abroad, is void at law. With reference to the first point it was admitted on behalf of the defendants that a person who has learned an invention abroad, and imported it into this country, where it was not known or used before, is the first and true inventor within the statute; but it was argued that, to come within the statute, the person who takes out a patent should be the meritorious importer—not a mere clerk or servant or other agent, to whom the communication was made for any special purpose by the foreign inventor, as for the purpose of enabling him to take out the patent for the benefit of such foreigner. No authority was cited for the distinction. "So far as relates to the interest of the public," said Chief Justice Tindal, "Berry (the patentee) has all the merit of the first inventor. If he has been guilty of any breach of faith in his mode of obtaining the communication, or in the mode of using it in England, he may or may not be made responsible to his employers abroad; but such misconduct seems to have no bearing upon the question—as between him and a stranger—whether the patent is void or valid." The learned reporters point out that it was not suggested that the patent was invalid on the ground of a device having been practiced on the Crown by the sup-

ssion of the trust. Secondly, no authority cited in support of the other ground of action.

Chief Justice Holt and Mr. Justice Pollexfen, in *Edgeberry v. Stephens*, 2 Salk. 448, held that a grant of a monopoly may be to the first importer by the 21 Jac. 1, c. 3, and, "If the invention be new in England, a patent may be granted, though the thing was practiced beyond the seas before, for the statute speaks of new manufactures within this realm; so that, if they be new here, it is within the statute, for the Act is intended to encourage new devices useful to the kingdom, and whether learned by travel or otherwise, it is the same thing." Thus the invention was the subject of the patent in *Stead v. Williams*, 7 M. & G. 818, had been previously practiced in practice in Russia. And it was also held in *Beard v. Egerton* that *Darcy v. Allin*, 10 Rep. 84, and 5 Geo. 2, c. 8, for extending the term of a patent for discovering and including the arts of making and working, etc., which Italian engines for making organ pipes, and for preserving the invention for the benefit of the kingdom, show that the law gives much effect to the introduction as to the invention of a new manufacture. The case of *Edgeberry v. Stephens* established the principle that the first introducer of an invention practiced beyond sea shall be deemed the first inventor. In the subsequent case of *Chappell v. Day*, 13 M. & W. 318, Chief Baron Pollock remarked that, "under the statute 21 Jac. 1, c. 3, against monopolies, the 6th section, which was as they stood at common law all the letters patent for fourteen years of new manufactures granted to the first inventors, it has been decided that an importer is within the statute, and if the manufacturer be new in the realm, he is an inventor and may have a patent." So; in another case, *Clothworkers of Norwich*, Godbolt, 252, it was resolved that, if a person has brought in a new invention and a new device within the kingdom, in peril of his life, disreputation of his estate, or the like, or if a person has made a new discovery, in such cases the King of his favor and grace, in recompense of his costs and labor, may grant by charter unto him that he only shall use such a trade or office for a certain time, "because at first the people of the kingdom are ignorant, and have not knowledge or skill to use it."

The point was definitely settled in *Ross*, 8 C. B. 679, that where it is alleged that, before the granting of the patent, the plaintiff represented to the defendant the consequence of a communication of an invention by a foreigner residing abroad, that the plaintiff was in possession of an invention, and that the plaintiff was a letters patent, the plaintiff was entitled to a verdict on the issue joined with the defendant that the invention was communicated to the plaintiff by a foreigner resident abroad, since the plaintiff avails himself of information from the defendant inventor within the meaning of 21 Jac. 1. Upon argument it was conceded that the invention was upon which party the burden rested. For the defendant it was contended that *prima facie* all monopolies are void, and that the party who seeks to establish a monopoly must show his case within the exception, and that the party opposing it to show the contrary. The progress of the argument, as given by Mr. Wilde made an observation to the effect that the circumstance of a person importing an invention into the country, and giving the public the benefit of it, is the basis of the temporary monopoly to him, and that the plaintiff was not aware that it ever had been held that it was necessary that the informant should be a foreigner. The correctness of the law is the very question upon which the case turns.

It is obvious that none of the above cases are direct authorities upon the question. In *Dalton v. The Saville Street Foundry*, 11 Q. B. 413, the Court of Appeal it was argued for the plaintiff that an English subject rightfully could communicate of a new invention to another English subject, was as much entitled to take out a patent for it as if he had communicated from abroad, and that the plaintiff's case so obtained was not valid, the public would be the benefit of many useful inventions, and no hardship would be inflicted on the rights of inventors who happened to be taking out patents for inventions. It was contended below it was argued that the Patent Amendment Act, 15 & 16 Vict. c. 87, was no proof that the only declaration an applicant for a letters patent is bound to make is that he is in possession of the patent, and that in the absence of the letters patent prove themselves, that the case taken by the defendants could not be

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PRESCRIPTION OF BILLS AND NOTES.

We have been asked to insert a short report of a judgment rendered by the Circuit Court, Montmagny. We comply with the request, but we cannot do so without appending to the report a few remarks, because the suggestion of our correspondent is that the judgment is wrong. It may be a case of hardship for the plaintiff, but the law as laid down by the Court is in accord with previous decisions. The report is as follows :

CIRCUIT COURT.

Montmagny, Nov. 15, 1878.

Bossé, J.

FISST V. FOURNIER.

Held, that a debt originally due under a promissory note, and which has been prescribed by the lapse of five years from the making of such note, cannot be recovered at law, although the defendant may have acknowledged in the presence of a witness, after prescription accrued, that he was still indebted to plaintiff in the amount of the note, and have promised to pay, thus renouncing the benefit of the prescription accrued.

The plaintiff sued the defendant for \$46.96, amount of a promissory note made by the defendant on the 17th May 1869, and plaintiff alleged specially that after the note was prescribed, to wit : in the month of June or July last, the defendant acknowledged in the presence of a witness that he owed the amount of the debt, and promised to pay when his means would permit him to do so. This fact was proved by the plaintiff's clerk. The Court dismissed the plaintiff's action with costs.

C. Pacaud for plaintiff.

A. J. Bender for defendant.

This is but following the doctrine laid down by the Court of Appeal in *Bowker* and *Fenn*, in which the Court held "that the prescription of five years, under the Promissory Note Act, c. 64, C. S. L. C., is so absolute, that no acknowledgement of indebtedness or partial payment will take the case out of the statute ; and if no suit or action be brought on a note within five years after its maturity, it will be held to be absolutely paid and discharged." 10 L. C. Jurist, p. 120. That was a celebrated case, and attracted much attention from the bar. The question was whether a written promise to pay and

payments on account h
rupting the prescription
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THE NATIONAL INSURANCE CO. V. CHEVRIER.
Company—Subscription of Stock—Parole Evidence of Agent's statement.

JOHNSON, J. Action for three calls of 10 per cent each on the \$1,000 of stock subscribed by the defendant. The plea was that the defendant's signature had been got by improper representations of the agent of the Company, a Mr. McDonald, and that in point of fact he was not held by his subscription. The evidence shows that although Chevrier may have subscribed incautiously and without sufficient enquiry, he did so deliberately and freely in the hope of profit, and it is no defence, of course, to say that the stock has turned out temporarily unprofitable. Now that is the proper effect of the evidence in this cause, for the verbal testimony of what McDonald said at the time of subscription cannot be received against the written consent of the party; therefore there must be judgment for the amount demanded, with costs.

Lunn & Co. for plaintiffs.

O. Augé for defendant.

JOHNSON, J.

DAME E. RICHIER, for certiorari, and JUDAH, Acting Recorder.

Quebec License Act, 1878—Revocation of certificate.

Section 92 of the Quebec License law of 1878, prohibiting the sale of liquor between 11 p. m. and 5 a. m., applies to the city of Montreal.

The Recorder has power, under section 102 of the Act, to revoke the certificate of a tavern-keeper.

JOHNSON, J. The writ in this case has brought up a conviction by the acting Recorder under the Quebec License law of 1878. The petitioner was convicted for having between 11 o'clock on the Saturday night of the 15th of June and 5 o'clock of the following morning, at the city of Montreal, sold two glasses of beer, she being at the time keeper of an inn situate in Craig street, and was condemned to pay a fine of fifty dollars and costs, or in default to go to jail for two months, and the certificate for her license was also revoked. The questions raised were whether the 92nd section applied to Montreal, and whether the Recorder's Court could revoke the certificate. The Court is against the petitioner on both points. The argument was that the 92nd section referred only to offences committed at the gold mines; but it clearly refers

to two distinct offences: selling at this particular place, and then the offence of selling at any restaurant or tavern. The Act had previous provisions what were to be considered, and had also provided for the gold mines, (same as before) provided the terms on which cases were to be obtained. The Act contains a prohibition of liquor between these parties. Section 94 gives the penalty, which has been exceeded in the present case, as there was a discrepancy between the English and French versions of the Act, saying that the penalty was not more than fifty dollars, but having substituted fifteen dollars. No doubt, the case in the present year; but at the next session (see 41-42) and this is in its nature active. As to the power of the Court to revoke the certificate, gives that power to "the Court," the sentence, or to the licensor. I am, therefore, of opinion that the petition must stand, and the petitioners pay costs.

Doutre & Co. for the petitioners.

R. Roy, Q. C., for the respondents.

Montreal.

RAINVILLE.

LEBUC V. LAURE.

Municipal Election—Qualification—Real Estate owned.

Held, that the qualification of an alderman for the city of Montreal under 37 Vic. c. 51, must be based on real estate owned by him, of which the alderman is a part owner.

The election of August 1881, of an Alderman for the St. Louis Ward, Montreal, was contested on the ground that the petitioner was not properly qualified under the Statute, 37 Vic. c. 51, s. 1, which provides that an alderman must own real estate to the value of \$2000, after deduction of his taxes. The petitioner proved that the defendant qualified was

of "A. Laberge & Fils," masons and contractors, of which the defendant was a member. It was contended that this was not a qualification such as the Statute required. In reply, the defendant alleged that the partnership between him and his father was a civil partnership, and that he could not be deprived of his share of the assets.

The Court held the qualification to be illegal: "Considering that by law, in commercial partnerships at least, one of the partners is not proprietor in common or *par indivis* of any part of an immoveable acquired by the firm, and cannot alienate or mortgage any part of such immoveable; and considering that even if the defendant was proprietor *par indivis* of half of the immoveable on which he qualified, it is proved that the said immoveable at the time of his nomination, was mortgaged for \$5,600, and that the hypothec is by law indivisible, and affects each part of the immoveable for the whole, and that the value of a half is proved to be only \$6,000."

Election declared void.

Lareau & Lebeuf for petitioner.

Lacoste & Globensky for defendant.

Montreal, Oct. 30, 1878.

MACKAY, J.

HAMILTON et al. v. ROY et al.

Compulsory Liquidation — Individual Estate of Copartners.

Held, where a writ of compulsory liquidation issues against the estate of a firm, the individual estates of the copartners vest in the official assignee as well as the copartnership estate.

The plaintiffs, on the 28th October, issued an attachment in compulsory liquidation against the defendants Adolphe Roy & Co., and John Fair, Official Assignee, took possession of the estate. On the 29th, La Banque Nationale issued a similar writ against the individual estate of Adolphe Roy, one of the defendants. Beausoleil, Official Assignee, petitioned for possession of the individual estate of Adolphe Roy, under the second writ.

Hutton, Q. C., for Fair, assignee, resisted the application, on the ground that the individual estates of the copartners vested in Fair, as well as the partnership estate, and cited: Clarke on the Insolvent Act, 1876, pp. 82, 304; In re

Macfarlane, 12 L. C. J. 239; 2 Lindley, 1143; Lee on Bankruptcy, 436; Bedarride, tit. 13, No. 743.

MACKAY, J., sustained the plaintiffs' pretension, holding that the individual estates also passed. The application of Beausoleil was therefore rejected.

Application rejected.

Hutton, Q. C., for Fair.

C. A. Geoffrion for Beausoleil.

COMMUNICATIONS.

STENOGRAPHERS.

To the Editor of THE LEGAL NEWS:

SIR,—I must admit that I have been one of the promoters of stenography in our system of taking the evidence in open court. I am sorry to say that I am not satisfied with the working of the system; but my complaint is more against the practical way of taking notes than against the system itself, which is of great service to the profession.

By law, the stenographer is an officer of the court, he takes notes of the evidence after being sworn, he reads his notes to the witnesses, and he certifies himself to the testimony already taken by him by stenography.

As a matter of theory I have nothing to say against that, but the practice is a public danger.

I admit that the stenographer is an officer of the court, but he is a sphinx, as nobody but himself can read his notes, and he may read to the witness what he said and write afterward what he has not said, and file in court the pretended testimony of that witness, keeping in his pockets his notes, if not destroying them. Against this danger we have no remedy, the stenographer not being obliged to file his notes. And what would be the use of filing them if no one but himself could read them?

My system of reform would be:

1st.—That the notes of evidence be taken on a uniform system of stenography.

2nd.—That a stenographer whose notes cannot be read by another stenographer, shall be incompetent to act as such.

3d.—That the notes will be the exclusive property of the Court, be certified by the prothonotary and copied in a handsome hand-

writing and filed in the court-house, remaining there for reference if necessary.

4th—That the notes should be read to the witness in the presence of the Judge, and identified by him, or by the prothonotary.

5th—That the fees paid for stenography should belong to the Crown, and that the stenographer, as an officer of the court, be paid a salary at the rate of \$2,000 per annum.

GONZALVE DOUTRE, D.C.L.,
Professor of Civil Procedure.

MONTREAL, 6th December, 1878.

A STENOGRAPHER'S VIEWS.

To the Editor of THE LEGAL NEWS:

SIR,—Although I do not wish to occupy an unremunerative space in your valuable paper, still, the subject upon which I desire to express an opinion is, *per se*, of such importance to myself and *compères*, as to be an apology for requesting insertion of the following.

I have observed with satisfaction that the recent reduction of Stenographers' fees has not only drawn forth remarks as to the inadvisability of doing so, (if a standard of reporting is to be upheld), but that, also, your observations have been endorsed by many others, and even articles have been the result of your comments.

It may be said that my statement will be one of partiality, but cannot the same be said with respect to the Advocates who have shown themselves as rather desiring "cheap" than competent labour?

It is said by an "old Stenographer" "that it is not an uncommon thing at all for the stenographers' fees in a case to amount to half the costs of the suit." Why is this? If an advocate takes a whole day by means of phonography to prove his case, how long would it occupy him were he to proceed by that ancient, peculiar, and anything but satisfactory *enquête* system, where a long-hand writer is but a mere tool in the hands of the lawyers, and, at times, what purports to be a deposition of a witness, is nothing more nor less than an indefinable concoction of the learned counsel. Again, an advocate's time is precious, at least, we are told so by them all, and they all concede that the stenographic system is advantageous and indispensable. For, where they would be occupied a week in taking evidence by long-hand, the

same amount by short-hand could be taken in a day, if not less; and, then, the deposition is the evidence of the witness as the law and justice intends it should be. The lawyer, then, in the five days remaining over, by adopting the speedy method, is able to proceed with his other cases, or attend at his office and rake in his consultation fees.

Every one knows the life of a reporter is anything but one of the healthiest of occupations, and the strain on the nerves to sit through a case all day, and then at night the transcribing of his notes tends to anything but his longevity.

With regard to the fees being sometimes \$30, \$40, or even \$50 in a case, I may say that a reporter would think himself lucky if he could calculate upon getting three or four cases a month at an average of \$40. It may be said, that is too high a figure to pay a stenographer. Why, Sir, the gentleman may be married, with a family to support, and have the same appreciation of the necessities and even the delicacies of life as a lawyer. Also, it is supposed by some lawyers that Reporters as students should not be rewarded with an equivalent to a lawyer's income. My pretension is this, if a reporter is competent to discharge the duties so onerously devolving upon him, a just *quantum meruit* should be his reward. Take, for instance, the reporting of an election case, where the slightest error or mistake would be prejudicial, if not fatal, to a man's interests, and is it not absolutely imperative to get the best available talent. In England, of course, there are a great many shorthand writers, but it is obvious that a shorthand writer may be anything but a *verbatim* reporter, which is essential to the correct and accurate photographing of a case. And in England the fees to a competent person are £1. 1s. a sitting, or £2. 2 0 if a long one, and 10d a folio of,—in some cases—76 and at most 100 words. In Montreal, among 176,000 people there are a greater number of able lawyers than *pro rata*, efficient phonographers. It must be borne in mind also that there is little or no work done in December, March, June and September, owing to the Court of Appeals sitting; January but three or four days; July and August is vacation, and the remainder of the year there are but about 16 days in each month where there is a chance of getting cases, and when they come to be divided up between each lawyer's office shorthanders,

there remains but a small portion of the work amongst the competent outsiders. When there were lots of cases (which is not the case now compared with two years ago) a stenographer, the same as a flourishing barrister, made a good living; but, now the work has not only decreased one-half, the Court house become an asylum for men out of situations, but the fees are cut down a third, and it is but a scanty living compared with the remuneration he should receive for devoting years to bringing himself to a proficiency.

With regard to the number of words charged in a page, and which the page does not actually contain: I may say, as a rule, it is not the case for stenographers to overcharge. On the other hand, the long-hand writers who sit at a table, have no night work, and put but about 50 to 150 on a page, get 20c. therefor, and for 200 words the Stenographer, who is supposed to be so diligent as to seize every point, receives 40 cts. It was suggested that Reporters should at least receive the same equivalent as a deputy prothonotary. I may say, a deputy prothonotary's work is incomparable with the labours of a stenographer. Were two French and two English reporters appointed by Government, the consequence would be, the long-hand system would be annihilated, and all cases taken by stenography.

Lawyers in heavy or difficult cases, do not forget their retainer, but the reporter may be occupied for days in a case where objections are the chief part of the *enquê*, and he receives nothing but his 20 cents per 100 words, *full measure*.

I trust, Sir, my letter, or explication of the matter at such length will be excusable, as I think it but right that the public should know the whole truth.

STENOS.

LEARNED WOMEN OF BOLOGNA.

We take the following extract from an article published under the above title, in the *International Review*:

The atmosphere of that learned city, whose appropriate motto is *Bononia docet*, seems to have been peculiarly favorable to the development of female talent, while its university, unlike those of otherwise more favored lands, has freely and ungrudgingly bestowed its diplomas

and professorships on all women who have proved themselves deserving of such distinction. [To the present day, there is no law to prevent women from graduating at Italian universities, or presenting themselves as candidates for professorships.]

As far back as the thirteenth century, when the Bologna University was so deservedly celebrated that it was frequented by no less than ten thousand students, many of them from far off England and Scotland, two women were numbered among its most distinguished professors, Accorsa Accorso and Bettisia Gozzadini.

The former was the daughter of the famous jurisconsult Accorso, author of a copious glossary of Roman law, so much esteemed for its precision and clearness that for many years it was the text book of all European tribunals. She filled the chair of philosophy at the university, but beyond that one fact—in itself a proof of her acquirements—history is silent about her.

Of *Bettisia Gozzadini* fuller mention is made. The historian Sigonio states that she was created *Doctor of Laws* in 1836, and in the same year commenced her public lectures, to the admiration of crowded audiences. She was a woman of immense erudition and powerful mind, and was for many years the ornament and pride of the university. So far Sigonio; and Ghirardacci, in his history of Bologna, tells us that she wrote on philosophy, law, and jurisprudence, and quotes a saying of hers to the effect that she loved her father as the author of her days, but that she loved and revered Doctor Odofreddo, the eminent jurisconsult, who had given her knowledge, esteeming herself highly favored to have been born in his time.

Tiraboschi maintains that Bettisia Gozzadini was considerably overpraised by her contemporaries, and remarks that the University of Bologna counted too many brilliant luminaries to be obliged to exaggerate the merits of those whose fame was not supported by the highest authorities.

In the *fourteenth century* we find but one lady professor at Bologna: one, too, who held her post by favor rather than by right. This was the learned and lovely *Novella*, daughter of *Giovanni d'Andrea*, renowned as the best jurisconsult of his day, and for a special aptitude in explaining the *Decretales*. Being thoroughly

versed in the law, Novella frequently took her father's place in the professorial chair, but hidden behind a curtain, to prevent her beauty from distracting her hearers' minds. Probably the poet Petrarch, for three years a pupil of Giovanni d'Andrea, may have been one of these hearers, but there is no record of the fact; and whatever his sentiments towards the daughter, he had but small friendship for the father, with whom, in later times, he carried on a long and ironical controversy on literary matters, in which Giovanni d'Andrea was thoroughly worsted.

USE AND ABUSE OF LEGAL HOLIDAYS.

On Thursday last the Long Vacation came to an end, and from all quarters of the globe counsel and solicitors have returned, or are returning, to the metropolis. Next Saturday the Lord Chancellor will receive Her Majesty's Judges in the customary manner, the Courts of Law will reopen, and practitioners will be as busy as the depressed condition of commerce, manufactures, and agriculture will permit.

Before the lawyers settle down to business, there will be much shaking of hands, and many friendly inquiries. Foremost among the topics of interest will be how our friends have spent the Vacation, and how they have enjoyed themselves. Innumerable are the recreations by which barristers and solicitors seek to regain health and strength after the labours of a legal year; and, for the first few days, there are pleasant comparisons of happy Vacation days. "Have you had good sport on the moors and in the turnips?" for this year there have really been turnips. "Have you been to the Paris Exhibition?" The rival attractions of foreign travel, Alpine climbing, shooting, country visits, seaside sojourns, Doncaster and Newmarket races, are discussed with as much animation as is possible when the coming toil of ten months is in prospect. Since the primitive days when Parliament was prorogued and the Courts adjourned in order that the harvest of England might be gathered, the way to spend the Long Vacation has been a fruitful theme of debate.

Indeed this is a subject of more real importance than would at first sight appear; and just as the professional classes increase in this country, and the things that can be done multi-

ply, so does the task of doing a holiday become more and more astonishing what a mass of their leisure time. By the life, the love of money, and bodily infirmities create even the desire for recreation, if lifted in a moment of professional labour, with the want of something that they have made no effort to skill for manly exercises, they were justly proud, or of healthy recreation for cannot ride, or shoot, or playing physical exertion; the country is to them inexpressible is vulgar and monotonous assent to a fortnight or the town to please their wives Vacation begins and ends.

Now, of late years, perhaps we speak not of English upon an idea. They have and congresses, and have by the pursuit of scientific tropical objects. This Vacation remarkable for meetings of the been a Congress of Oriental German Naturalists at Cassel Prison Congress at Stockholm Jurists Congress at Christon International Law at F of the Institut de Droit In and a sitting of the Association Commerce at Sheffield. There began on Wednesday, annual meeting of the National the Promotion of Social & important section of which Promoting the Amendment Codification of the Criminal of Real Property Law, Sum Justices, Prison Discipline the subjects to which men to earn devote themselves leisure, from love of their and in the pursuit of recreation.

We do not desire to the labours of these holiday-military, we have always recognized the valuable results flowing

try; nevertheless we may point to this modern method of using leisure as a phenomenon of modern life. The manual labourers of our time do not work much more than half as hard as their forefathers; the professional classes seem eager to surpass their predecessors in industry. Even these voluntary workers may boast themselves vastly superior in wisdom to the counsel who spend their Long Vacation in the Temple at Lincoln's Inn, either picking up the crumbs that fall from the rich man's table, or writing legal text-books.

The truth is that life is too short, and the mental and physical constitution of mankind too weak, to stand the pressure of uninterrupted professional labour. Those who fancy that they can devote themselves to law for twelve months in the year, should read Dr. Carpenter's "Mental Physiology" and Dr. Richardson on "Health," and should also regard the examples around them of the necessary effect of unremitting toil—"neque semper arcum tendit Apollo." If we had two existences in this life, and after thirty years of unbroken industry we were allowed thirty years of healthy leisure in which to enjoy the wealth we had earned, the reasonable course would be to give up youth and manhood to severe and protracted labour. But it is not so; and he is most wise who so tempers toil with relaxation as to preserve his mental and bodily vigour to old age.

This admirable result can only be achieved by preserving the physical energy, and cultivating a taste for those bodily exercises which become a man. Wealth, and the highest honours of the profession are earned too dearly, if health is sacrificed in the pursuit. In all times members of the legal profession have been celebrated for their capacity for enjoying their hours of ease after a healthy and rational manner. They are noted for longevity beyond all other classes of industrial society, and they ought not now to be induced by the charms either of congresses or Long Vacation business to destroy the greatest of all blessings—"mens sana in corpore sano."—*London Law Journal*.

SALES BY SAMPLE.

The Supreme Court of Pennsylvania announced a novel rule in the law regarding sales by sample in the case of *Boyd v. Wilson*, 83 Penn. St. 319; S. C., 24 Am. Rep. 176. It was

therein held that a sale by sample, in the absence of fraud or of circumstances indicating that the sample is to be taken as a standard of quality, implies no warranty of quality, but only that the goods are of the same kind as the sample and merchantable. From this decision Mr. Justice Sherwood dissented.

This decision seems to be well fortified by former decisions in the same State, but we much doubt if it finds support elsewhere.

Mr. Benjamin, in his excellent work on Sales, says, § 648: "Of implied warranties in sale of chattels there are several recognized by law. The first and most general is, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample;" and this rule, he says, "is so universally taken for granted that it is hardly necessary to give direct authority for it." The editor of the American edition has added a large number of cases in which this rule is followed.

So in Story on Sales, § 376, in considering the exceptions to the rule *cascat emptor*, it is said: "The next exception is where goods are sold by sample; in which case a warranty is implied that the bulk corresponds to the sample in nature and quality. The exhibition of a sample is equivalent to affirmation that all the goods sold by it are similar, and if they be not, the vendee may rescind the contract."

This rule is so well established that it requires no support by citation of authorities, but its application is a matter that may bear a little illustration.

The mere circumstance that the seller exhibits a sample at the time of the sale will not of itself make it a sale by sample so as to raise an implied warranty as to the quality of the goods. The contract must be made solely with reference to the sample exhibited, and the parties must understand that they are dealing upon the understanding that the bulk corresponds with the sample. *Beirne v. Dord*, 5 N.Y. 95; *Hargous v. Stone*, id. 73; *Waring v. Mason*, 18 Wend. 425; *Cousinery v. Pearsall*, 4 N.Y. Supr. 113; *Day v. Ragnet*, 14 Minn. 273; *Bradford v. Manly*, 13 Mass. 139, per Parker, C. J.

The question whether goods are sold by sample or not is a question of fact. *Andrews v. Kneeland*, 6 Cow. 354; *Hargous v. Stone*, 5 N.Y. 73.

Where the purchaser has an opportunity to inspect the bulk of the goods, is requested by the seller to examine, and does examine, then it is not a sale by sample and no warranty is implied. Thus, where the goods were hemp in bales, and the purchaser, at the request of the seller, examined several of the bales by cutting them open, and might have examined all of them, it was held not to be a sale by sample, and that no warranty was implied that the interior of the bales corresponded with the exterior. *Salisbury v. Stainer*, 19 Wend. 159. See, also, *Kellogg v. Barnard*, 6 Blatchf. 279; *S. C.*, 10 Wall. 383; *Hargous v. Stone*, 5 N. Y. 73.

In *Hubbard v. George*, 49 Ill. 275, where a purchaser of wheat by sample, on the arrival of one car-load hastily examined it, saying, "it will do," it was held that he was not thereby concluded from rejecting loads subsequently arriving under the same contract.

The general rule, however, is, that where goods in several lots are purchased under an entire contract, the purchaser must either accept or reject all or none. *Mansfield v. Trigg*, 113 Mass. 350; *Morse v. Brackett*, 98 id. 205; *Couston v. Chapman*, 1. B., 2 Sc. App. 250.

If an inspection is ineffectual from the vendor's fraud or fault it is no inspection. *Heilbutt v. Hickson*, L. B., 1 C. P. 438. So, if by a defect not visible to the eye, the article has lost its distinctive character, as in *Josling v. Kingsford*, 13 C. B. (N. S.) 447, where the buyer not only inspected the samples, but the bulk, and the vendor said he would not warrant the strength of the "oxalic acid" sold, it was held that the purchaser was not bound to accept, because by adulteration with sulphate of magnesia the article had ceased to be "oxalic acid." And see *Williams v. Shafford*, 8 Pick. 250.

But where a sale was by sample of an article which the vendor called seed-barley, but said he did not know what it really was, and the bulk corresponded with the sample, it was held that the buyer took at his own risk, whether it was seed-barley or not. *Carter v. Crick*, 4 H. & N. 412.

That the manufacture of an article impliedly warrants it against secret defects arising from the manufacture is settled. *Hoe v. Sanborn*, 21 N. Y. 552, and cases cited: *Jones v. Just*, L. B., 3 Q. B. 197. So, if a manufacturer agrees to

furnish goods according to sample, it is to be considered free from defects of manufacture not discovered and unknown to both. *Hickson*, L. B. 7 C. P. 438. Implied warranty against defects in the samples and the goods not the manufacturer. *Allen*, 29.

Where an average sample is taken from a number of packages from each and mixing them, the purchaser may not reject any of the packages that they are inferior to the test is, whether, if all the packages were together, the quality of the bulk would equal the sample. *Allen*, N. Y. 289.

And a custom may be established in the sale of articles, such, for instance, in bags by sample, the same as the average quality of the entire lot. *Oriental Paint Works*, 114 M.

But evidence is not admissible to show a custom of merchants, there is no warranty that goods are not false. *Barnard v. Kellogg*, and see the American note to *Dallison*, 1 Sm. Lead. Cas. It may be proved limiting the time to examine and return the goods. *Granger*, 78 Ill. 230.

The purchaser of goods should examine them without delay. If he finds that they are not conformable to the sample, he may reject them and return them, giving immediate notice to the vendor, who then must acquiesce, or the purchaser may place the goods in neutral and apprise the vendor. *Couston*, 2 Sc. App. 250; *Freeman v. Park v. Morris, etc., Co.*, 4 L. R. 101. Or if the vendor refuses, the purchaser may sell the goods at a fair price, he can obtain without notice the time and place of sale. *Shot Co.*, 40 N. Y. 422.

The burden of proof to show that the goods correspond with the sample in a suit for their price. *Meade v. Shot Co.*, 32 Conn. 146.—*Albany Law*.

CURRENT EVENTS.

ENGLAND.

MODEL DIGEST.—At the recent Social Science Congress, Mr. H. W. Boyd Mackay, of Exeter, read a paper on a method devised by him for the more perfect formularization of the law. He stated that he had, for many years, been engaged in analyzing the judicial decisions and statutory enactments, with a view to discovering some principle on which the objects generally regarded as *desiderata* might be simultaneously attained, and that he believed he had at last arrived at a solution of this problem. He pointed out that a digest should combine a perfectly scientific character with a perfectly alphabetical form, and should present, in detail, all the material facts of each abstracted case, and yet present them in such a manner as should render it unnecessary for the reader to peruse any of them but those bearing on the matter he might have in hand. In explaining how this purpose might be accomplished, he drew a parallel between law and the natural sciences, and pointed out that a much closer analogy exists between them than is generally suspected, and that this method might be advantageously used for the statement of any branch of science. He also severely animadverted on the waste of energy in the preparation of legal instruments which the present state of the law renders necessary, and expressed an opinion that the clauses which are now usually inserted in such instruments might and ought to be formulated into rules of law, operative under the same circumstances under which they are now adopted as express stipulations. In conclusion, he expressed a hope that the Government would see the wisdom of expending a small portion of the public money on the preparation of a code which should embrace, not only the judiciary and statutory law, but also the common forms of conveyancing; and thereby save the profession the great expenditure of time and energy, and to the public the great expenditure of money, which the present intricate and antiquated state of the law rendered necessary.

IRELAND.

LORD JUSTICE CHRISTIAN.—The London *Law Times* in commenting upon the retirement of Lord Justice Christian from the bench says:—

The Irish Bench has suffered very heavy loss by the death of Mr. Justice Keogh and the retirement of Lord Justice Christian. The latter learned judge retires with a great reputation; as a lawyer he has adorned the bench, whilst any defects of temper which he has displayed have only become conspicuous when his Lordship has felt called upon to attack what he believed to be abuses. But greatly as his disappearance from the Irish Court of Appeal is to be regretted, it is far better that judges should retire than continue on the bench struggling against physical infirmities.

SCOTLAND.

SALE OF SCOTTISH PRISONS.—The following prisons in Scotland, which have been closed by the government since the new Prisons Act came into force, were exposed for sale in Dowell's Rooms, George street, last month, at the instance of Donald Beith, solicitor for her Majesty's Board of Works and Public Buildings: Kirkintilloch, upset £120, sold to Mr. Reid, Kirkintilloch, for £140; Pollockshaw, sold to Mr. J. Caldwell at the upset price, £360; Hawick, upset price, £120, sold to the Magistrates of Hawick for £360. Kelso prison was sold privately at £200, the upset price having been £120. The prisons of Helensburgh, Dunbar, Stonehaven, Nairn, Peebles, Tain, and Kinross had been previously sold. Banff prison was exposed at £720, but no offer having been made, the sale was adjourned.—*Edinburgh Law Magazine*.

CRIMINAL PROCEDURE IN SCOTLAND.—A correspondent writes in reference to the criminal proceedings in the Glasgow Bank case, that in Scotland the action of the law against persons suspected of crime is swift and decisive. The steps are taken in silence as far as the outside world is concerned, and until the person stands at the bar of the High Court of Justiciary, the world only knows that an arrest has been made, and that a certain crime has been committed; there information ceases. After the arrest of the accused, the judicial examination of the prisoner takes place immediately. Whatever the prisoner says at the time must be said voluntarily, but at this stage of the proceedings he is not permitted to have legal advice. What he says is written down and the writing at the

conclusion signed by the prisoner and magistrate. Two witnesses must be present and attest this declaration. Preparatory to the indicting of the accused, the examining magistrate may cite witnesses. Each witness is examined separately and not in the presence of any of the others. After the examination the prisoner may have legal advice. Fifteen days before the trial the prisoner is entitled to a copy of the indictment, and also to notice of witnesses who are to appear to give evidence against him, and also to a list of the jurors before whom he is to be tried. The prisoner, on the other hand, is bound to give notice of any witnesses he intends to call, twenty-four hours before trial. This is, however, not always enforced. A definite period can be fixed by the prisoner for his trial, irrespective of the sitting of the courts. He may apply for intimation to the public prosecutor, and the person on whose application he was imprisoned, calling on them within the next sixty days to execute an indictment against him, and to bring his trial to a conclusion within forty days thereafter; failing this he is liberated.

FRANCE.

AFTER VACATION.—The *rentrée*, after the summer vacations of the Parisian courts and tribunals of justice, took place on the 4th November, according to the customary ceremonial. After hearing the mass of the Saint Esprit at the Sainte Chapelle, where the Archbishop of Paris officiated, the judges and magistrates proceeded in their robes to their various courts to take part in the *audience solennelle*, the leading feature of which is a learned speech by one of their number on some subject connected with the history or theory of law. M. Dufaure was much remarked as he came out of the Sainte Chapelle, at the head of the bar, walking by the side of the *détonnier*, Maître Nicolet.

GENERAL NOTES

The statistics of divorce actions in Vermont are thus stated in a local paper: "During the year 1876 one hundred and sixty-eight divorces were granted in the State—three less than in 1875—being one divorce to every sixteen marriages. In one hundred and twenty-three cases

the wife was the petitioner, the husband. Sixty-six were for 'adultery,' eleven for 'neglect,' twenty-four for 'abandonment,' and twenty-four for 'other reasons.'"

In the United States Circuit Court for the District of South Carolina, during the early part of the year 1862, several interesting questions were passed upon. The first was a trial of a number of Federal officers for assault and battery in a case where they were engaged in the manufacture of counterfeit money. The officers of the United States Circuit Court met certain persons in a wagon whiskey revenue stamps on the boxes, and thereupon arrested these persons for the purpose of preventing them from selling the hand-cuffed them. The court held that without the issue of a writ under the circumstances, the use of hand-cuffs to prevent escape was lawful. In another case it was decided that a marshal in executing a warrant had a right to call other persons to his aid, and that while acting in concert with others he was entitled to the same protection as he would be.

ERSKINE'S PET LEECHES.— trifling topics of conversa says Sir Samuel Romilly, while to mention one, as it izes Lord Erskine. He ha and felt a strong sympathy has talked for years of a b into parliament to preven them. He always had sor to whom he has been muc whom all his acquaintances anecdotes to relate ; a favo used to bring, when he was consultations ; another favo the time when he was Lo himself rescued in the stre who were about to kill it un its being mad ; a favorite go him wherever he walked ab favorite macaw, and other du out number. He told us ne two favorite leeches. He h them last autumn when h

dangerously ill at Portsmouth; they had saved his life, and he had brought them with him to town, had ever since kept them in a glass, had himself every day given them fresh water, and had formed a friendship for them. He said he was sure they both knew him and were grateful to him. He had given them different names, 'Home' and 'Cline' (the names of two celebrated surgeons), their dispositions being quite different. After a good deal of conversation about them, he went himself, brought them out of his library, and placed them in their glass upon the table. It is impossible, however, without the vivacity, the tones, the details and the gestures of Lord Erskine, to give an adequate idea of this singular scene." Amongst the listeners to Erskine, whilst he spoke eloquently and with fervor of the virtue of his two leeches, were the Duke of Norfolk, Lord Grenville, Lord Gray, Lord Holland, Lord Ellenborough, Lord Lauderdale, Lord Henry Petty, and Thomas Grenville.

DILIGENT IN BUSINESS.—Whilst he was presiding at the trial of a thief in the Old Bailey, Sir John Sylvester, Recorder of London, said incidentally that he had left his watch at home. The trial ended in an acquittal, the prisoner had no sooner gained his liberty than he hastened to the recorder's house, and sent in word to Lady Sylvester that he was a constable and had been sent from the Old Bailey to fetch her husband's watch. When the recorder returned home and found he had lost his watch, it is to be feared that Lady Sylvester lost her usual equanimity.—*Jeaffreson*.

AN INTRICATE QUESTION, LOGICALLY DECIDED.—Four men in India, partners in business, bought several bales of Indian rugs, and also some cotton bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular part of the cat; and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by an accident, injured one of her legs. The owner of that member wound around it a bag soaked in oil. The cat, going too near the hearth, set this rag on fire, and being in great pain, rushed in among the cotton bales, where she was accustomed to hunt rats. The cotton and rugs thereby took fire, and they were burned up—a total loss.

The three other parties brought a suit to recover the value of the goods destroyed against the fourth partner, who owned this particular leg of the cat. The Judge examined the case, and decided thus:

"The leg that had the oiled rag on it was hurt: the cat could not use that leg; in fact, it held up that leg, and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg."

AN INGENUOUS DEFENCE.—The *Nonconformist*, in a paragraph on pulpit plagiarism, says that recently a student, after delivering a trial discourse in a Scottish divinity hall, being charged by one of his fellow-students with plagiarism, coolly replied, "I wrote my sermon with inverted commas." "But how," exclaimed his fellow-student, "could your inverted commas be discovered by the Professor?" "Did you not observe," replied the unabashed thief, "that I turned up my tongue twice, in imitation of inverted commas, when I commenced my discourse, and turned down my tongue twice, at the other side of my mouth, when I had finished my sermon?"

TRIAL BY JURY.—The acquittal of Bartley, on the charge of having murdered Serjeant Doré in the County of Beauce, has excited considerable remark. *L'Evénement* publishes the names of the jurymen, all French-Canadians, with their places of residence. It says:—"A verdict like this is a shame and a disgrace, and at the same time a serious warning that the notions of an oath and of duties toward society have become very weak in a considerable portion of the class from which juries are drawn." The *Courrier du Canada* says:—"According to the Court the verdict given in this case is evidently false, and the jury is guilty of perjury, either voluntary or involuntary. The sacredness of an oath is set at naught to-day, and we have proof that in this case one of the jurymen declared that he did not know whether the Holy Scriptures was a good book or not. Ignorance is very great among that population, and the sooner it is deprived of trial by jury the better it will be for the honor of justice."

The Legal News.

Vol. I. DECEMBER 21, 1878. No. 51.

THE FISHERY DISPUTE.

As the amount of the Fishery Award under the arbitration provided for by the Treaty of Washington, has been paid by the United States, it is unnecessary to comment at present on the extraordinary position assumed by Mr. Secretary Evarts, in the diplomatic correspondence, in reference to the claim of United States fishermen to privileges from which the Newfoundland fishermen are debarred by local statutes intended to preserve the fisheries from decay. We may, however, reproduce a circular addressed by Mr. Marcy, another United States Secretary, in 1856, to collectors of customs. In this circular, Mr. Marcy shows how he interpreted the language of the Reciprocity Treaty, —language the same as that which is used in the Treaty of Washington, on the point on question. The Reciprocity Treaty enacted that the inhabitants of each country should have "in common" with those of the other, the liberty to fish in the waters of both nations. Thereupon Mr. Marcy wrote as follows :

DEPARTMENT OF STATE,
WASHINGTON, March 28, 1856. }

To Charles H. Peaslee, Esq., Collector of Customs,
Boston :

SIR,—It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies, and injuries to the fishing thereon. It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on these coasts. Such being the object of these laws and regulations, the observance of them is enjoined upon the citizens of the United States in like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries neither party has yielded its right to civic jurisdiction over a marine league along its

coasts. Its laws citizens or subject own. The laws of conflict with the pr treaty would be as l the United States upon British subj framed or executed tion in favor of Brit the rights secured that treaty, those ir will appeal to this G presenting complain be cause for doing furnish the Departm the law or regulator ously to affect their fair discrimination l the respective countr any supposed grievanc law or regulation, in be arranged by the will make this directi of such fishing vessel in such manner as sirable.

I am

The above presents the view set forth by wrote :—" You will the bury that this govern fishery rights of the U the Treaty of Washing wholly free from the r of the statutes of New an authority over our f other regulation of fishi may hereafter be enacte

PRESCRIPTION OF

Writing somewhat ha above subject as we wer we overlooked at the portant case of *Walker* In that case the majority expressly overruled the or perhaps it would be that they held that und not what it was said to

The case of *Fiset v. Fournier* (ante p. 589) is not precisely the same as *Walker & Sweet*, because in *Fiset v. Fournier* the five years had elapsed and prescription had been acquired, before the alleged acknowledgment of indebtedness by the debtor. In *Walker & Sweet* the acknowledgment of indebtedness was before prescription had been acquired. But is this difference of any importance? If it is, Mr. Justice Bossé's judgment might still be correct, notwithstanding *Walker & Sweet*. Our own impression of that ruling is that it establishes that a prescription acquired may be renounced by the debtor as far as he is himself concerned, the same as prescription may be interrupted. In the case of *Fuchs v. Légaré*, (3 Q. L. R. 11), to which a correspondent has referred, Mr. Justice Casault expressly held that prescription acquired may be renounced, but the proof of renunciation in matters over \$50 must be in writing. We take it, therefore, that if the report of *Fiset v. Fournier* presents the facts correctly, the decision in that case was given in forgetfulness of *Walker & Sweet*.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Dec. 12, 1878.

TORRANCE, J.

ROY et al. v. THIBAUT.

Alderman—Property Qualification—Residence.

Held, 1. The Court will exercise a discretion in granting the conclusions of a petition in the nature of a *quo warranto* information.

2. A person occupying two adjacent rooms, one as an office and the other as a residence, in the City of Montreal, is a resident householder in the terms of 37 Vict. (Que) c. 51, s. 17.

The petitioners contested the right of the defendant to sit as Alderman for St. Mary Ward, in the City of Montreal. The grounds of objection were two. First, that Mr. Thibault was not a resident householder, and secondly, that he did not possess the necessary property qualification, i. e., real estate of the value of \$2,000, after deduction of his just debts.

TORRANCE, J., said that the defendant lived separate from his wife and children, and occu-

pled two rooms in a house on Notre-Dame Street, one as an office, and the other as a bedroom and eating-room. His Honor considered that under these circumstances he must be considered a resident and a householder. See Fisher's Digest, vo. Election Law, 3419. As to the property qualification, the property appeared by the books at the Registry Office to be charged with encumbrances which had been extinguished or paid off. The question was, what was the amount of the actual charges? The evidence on this point did not establish satisfactorily that the value of the property less the charges, fell below the \$2,000, and moreover, the defendant's term of office had almost expired. The Court would exercise a discretion, and not disturb the defendant's possession under the circumstances. The petition, therefore, would be rejected; but seeing that the petitioners had been misled by the appearance of mortgages which had ceased to exist, each party would be ordered to pay his own costs.

E. Lareau, for petitioners.

A. Lacoste, Q. C., for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Dec. 14, 1878.

Present:—Sir A. A. DORION, C. J., MONK, RAMSAY, CROSS and TESSIER, JJ.

KERR, (def. below), Appellant; and BROWN et al., (plffs. below), Respondents.

Guarantee—Personal Liability of person signing "as President" of Company.

R. Kerr, the defendant, signed a letter of guarantee in the following form:

" Montreal, May 11, 1874.

" Messrs. Ritchie & Borlase,

" Gentlemen,—

" We, the undersigned, acting as director and secretary of the Montreal Omnibus Company, hereby agree to see the account that Brown and St. Charles have against the said Company duly settled, provided that the said account shall be made out, and agreed upon as either the court or arbitrator shall decide.

" R. KERR,

" As President of the M. O. Co."

He delivered this letter, which was not signed by the secretary, to the attorneys of Brown and St. Charles, the plaintiffs.

Held, that he was personally liable.

To avoid an attachment of the property of the Montreal Omnibus Company the appellant,

who was president of the company, gave the respondent's attorneys the letter of guarantee quoted above. Being sued personally on the undertaking, he pleaded specially that he only signed as president, that the letter was to be countersigned by the secretary, and that he did not intend to bind himself personally.

RAMSAY, J. Two questions arise: 1st.—Did Kerr act as director? 2nd.—Is the undertaking binding without the signature of the secretary? The words of the letter seem to imply that the appellant was only "acting as president," but the whole tenor of the instrument shows that if appellant was acting at all it was personally. There can be no doubt that it was intended as a guarantee. Now, if the president was only signing for the company, it was no guarantee at all. The words of the instrument therefore qualify the words "acting as." See *Healey & Story*, 3 Ex. 3, 18 L. J. (Ex) 8. As to the second question, the appellant delivered the note without the secretary's signature. He thereby abandoned the secretary's signature, and made himself liable for the whole. On both points, therefore, the majority of the Court is against the appellant, and the judgment of the Court of Review, by which he was condemned, must be confirmed.

CROSS, J., dissented.

Judgment confirmed.

J. L. Morris, for Appellant.

Ritchie & Borlase, for Respondents.

HUDON et ux. (defts. below), Appellants, and MARCHEAU (plff. below), Respondent.

Husband and Wife—Liability for Necessaries.

Held, that a wife separated as to property is not liable for the value of necessaries supplied to the family, where credit is given to the husband and the goods are charged to him in the books of the creditor.

The respondent sued the appellants for an account of \$107 for goods sold to them. The appellants, husband and wife separated as to property, pleaded separately, that the price of the goods was to be taken in deduction of what the respondent owed Ephrem Hudon, fils & Co., and Ephrem Hudon, fils. The Court below condemned both the defendants to pay.

DORION, C. J., said the question was as to the responsibility of the wife. The rule in these cases was very simple. A woman *séparée* may

buy goods and a trader sells to him, the wife is, to whom was band, or to the credit was not were charged to the account was due by F. Hudo given to him also *Michaud*, 21 L. C. established that the husband in appears to have b separated as to p the goods are n family. The test is, to whom wa judgment must b dismissed as to th

Duhamel, Pagn
Appellants.

Lareau & Lebeuf.

MULLIN et al. (de
MICHON et al. (plffs
Substitution — Inves
Estate—

Real estate of a s purchase money was a of M., the purchaser, u be found. Subsequen purchase money was council. *Held*, that M the money on the groc ment was not in strict the deed creating the s

MONK, J. Dame 1 years ago made a do two children. A s favor of the childre the conditions of institutes should hav perty, provided a pro of the proceeds on th The institute sold a the appellant, Mullin the purchase money s at interest, until the c til either of them shou of his or her share.

curators to the substitution, being of opinion that a more advantageous investment might be made, a family council was convoked for the purpose of authorizing the proposed investment. The investment was sanctioned by the family council, but Mullin refused to pay over the money on the ground that according to the condition in the deed of donation, the proceeds should be invested on the security of real estate. The present action was then brought, and Mullin, in his defence, set up the condition. The answer to that was that the investment had been authorized by the family council. The Court below was of opinion that Mullin's defence was unfounded, and he was condemned to pay the amount. From that judgment the present appeal had been taken to this Court. The Court here was unanimously of opinion to confirm the judgment. The family council was perfectly regular, and this mode of investment had been formally sanctioned by it. It was difficult to see what Mullin's interest was in contesting the point. The family council's decision was a good discharge to him. Now, however, that he had got two judgments deciding that he ought to pay the money, he would no doubt feel relieved from all doubt.

Judgment confirmed.

Judah, Wurtele & Branchaud for the Appellants.
Doherty & Doherty for the Respondents.

CITIZENS INSURANCE Co., (defts. below), Appellants; and ROLLAND, (plff. below), Respondent.

Insurance—Verdict—Error.

Plaintiff sued under a policy covering goods in No. 319 St. Paul Street. The jury included in their verdict value of stock belonging to plaintiff, which was stored in No. 315 adjoining.

Held, error under the action as brought, and new trial ordered.

DORON, C. J., remarked that the case was one of considerable difficulty. The action was brought on a policy of insurance, covering the stock-in-trade of the respondent in a warehouse described in the policy as No. 319 St. Paul Street. The jury found for the respondent, and included in their verdict the loss of stock belonging to respondent, which was stored in No. 315 adjoining, stating in the findings that the appellants having continued the policy in force without objecting to the respondent keeping

some of his stock in No. 315, the stock which was there was covered by the policy. This was going beyond the questions put to them. His Honor referred to the decision of the Supreme Court in the case of *Wyld & Darling v. The Liverpool and London and Globe Insurance Company* as sustaining, to some extent, the pretension of the respondent, that the knowledge of the agent as to the location of the goods, would bind the Company. But the question was not properly raised under the pleadings, and the case must be sent back for a new trial.

RAMSAY, J. I think the judgment should be reversed. The contract is the original policy. There was no new contract after the visit of Mr. Muir, the agent; at all events, there is none proved, seeing a doorway cannot be construed into extending the insurance of goods on one side of the doorway to an insurance of goods on both sides of the doorway. We have, therefore, to go back to the original policy, and see whether there is any accidental misdescription to which, equitably, the verdict could apply. No such pretension can be sustained for a moment. Rolland was not the occupant of No. 315, when the policy was made. I think the answer of the special verdict to interrogatory 3 is not an answer to the question, that it is beyond the issues raised in the action, and that it is contrary to the evidence. I concur in the judgment ordering a new trial, for there is no doubt there was something, at all events, for the jury to pass upon. There were goods still remaining in the portion of the building insured, but the jury had nothing to do with the goods in No. 315, and no verdict passing upon that could bind the company. The Appellants get their costs in this Court; the costs in the Court below are reserved until the final decision.

New trial ordered.

Abbott, Tail, Witherspoon & Abbott, for the Appellants.

Archambault & David, for the Respondent.

COMMUNICATIONS.

STENOGRAPHY.

To the Editor of THE LEGAL NEWS:

SIR,—It must be admitted that Mr. Doutre's letter exhibits a real disposition to remedy the

present unsatisfactory manner of carrying out the system of taking evidence by stenography, and it would be well to take hold of his proposals as a basis for reform; more especially his suggestions that a uniform system of shorthand should be used, and that no stenographer should be employed unless his notes can be read by another shorthand-writer: for, even supposing, after due consideration, that it were not found feasible to appoint a set of salaried stenographers (two English and two French), as fixed officers of the Court, still Mr. Doutré's ideas might be practically applied, and with good effect.

Why not make it necessary that every stenographer, before being allowed to be sworn to take the evidence in a case, and before being allowed to receive his fees for same, shall obtain, (and produce, if required), a certificate signed by some competent authority, to be fixed upon by the Court or the Bar, to the effect that he has undergone and satisfactorily passed a test examination?

The test might be effected in some such way as this:—Let some suitable person dictate, to the candidate, for, say, half an hour, at a reasonable rate of speed, from some book or document to be selected, and then let some shorthand-writer of the same system, who has withdrawn from the room during the dictation, be called in to read over the notes taken by the candidate while the person who has dictated keeps his eyes on the passage selected, in order to test the candidate's correctness. This would be a proper test of proficiency, for no man can be said to write any system of shorthand properly unless another who knows the system can read his notes. It would not be absolutely necessary for the reader of the notes to be himself a rapid shorthand writer. It is well known that in England there are on the Press phonographic compositors who, though not rapid writers themselves, can and do very readily set up the type direct from the shorthand notes of *verbatim* reporters.

In connection with Mr. Doutré's idea of using a uniform system, there naturally arises the question, Which is best?

Of course it is needless to say that upon this point, at any rate in America, opinions are somewhat divided. I think, however, that on the whole, the general leaning is towards Mr. Isaac

Pitman's, who is cerography; and although he does not put forward these on examination Isaac's, and are, for the most part, modifications of that system in its various stages. It has been used for the last 40 years in this country, and is bringing it to its present position. The best arguments are that the most expert are to be found among those who use it, and that Mr. Pitman himself, comparatively old, is able to write at the rate of 200 words per minute.

Y.

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To CORRESPONDENT
of "C. P." and some
late for insertion in the

DIV

A Roman marriage was one of the spouses; at the time of the parties. It was at Rome, and was always required the sanction of the family, although the unjustified dissolution of a marriage visited with more or less of right was never denied.

Divortium was the name given to the instance of either party (16, 191).

Repudium was strictly the name of betrothal (divortium is taken as the name of marriage, and *repudium* divorce (*repudio misso*)).

A marriage could be dissolved by the wife, or by the hands of her husband, or by the husband, or by the father in the case of a minor. When she married with *manus*, she remained in the power of the father, and the father in the case of a minor could take his daughter from the wishes of both. This was a constitution of Antonin

a father from disturbing a harmonious union, unless, as Marcus Aurelius added, for very weighty reasons. The father could not of course take away his daughter from her husband if she were not emancipated.

Divorce by mutual consent (divortium bona gratia).—From the foundation of Rome to the time of Justinian, divorces might take place by mutual consent without any check from the law whatever. For a long time divorce was not abused by the Romans, but toward the latter part of the Republic and under the Empire divorces became very common. Seneca notices this laxity of manners; and Juvenal (6 Sat., 20th line) gives a remarkable instance of a Roman matron who is said to have gone the round of eight husbands in five years. Pompey divorced his wife Mucia for alleged adultery. Cicero speaks of Paula Valeria as being ready to serve her husband with notice of divorce on his return from his Province. Cicero himself divorced his wife Terentia after living with her thirty years. Justinian prohibited divorces by the mutual consent of the parties, except in three cases: First, when the husband was impotent; second, when either husband or wife desired to enter a monastery; third, when either of them was in captivity for a certain length of time. At a later period Justinian enacted that persons dissolving a marriage by mutual consent should forfeit all their property and be confined for life in a monastery, which was to receive a third of the forfeited property, the remaining two-thirds going to the children of their marriage. This severity, so much at variance with the Roman spirit, indicates the growing power of the clergy. Justinian's nephew and successor repealed his uncle's prohibition, and restored divorces *bona gratia*. Before the Lex Julia de Adulteriis no special form was observed,—either party could dissolve the marriage by telling the other that it was at an end. The husband generally took the keys from his wife, put her out of his house, gave her back her dowry, and so dissolved the marriage. This might be done in the wife's absence. Cicero divorced his wife Terentia by letter.

The Lex Julia de Adulteriis required a written bill of divorce (*libellus repudii*); the written record of the marriage was destroyed and the divorce publicly registered. There must be a deliberate intention to break up the marriage,

and the repudiation was considered valid, although there was no excuse for it, and it was unnecessary even to acquaint the other party with the change in their condition. If the wife made a bill of divorce in the presence of the requisite witnesses, the marriage was dissolved without delivery of the bill to the husband, and even without his knowledge of it. It was proper, however, to deliver the bill of divorce to the other party. The laws of the XII Tables seem to have recognised freedom of divorce, although it is said that no one took advantage of the liberty for 500 years, until Sp. Carvilius put away his wife for barrenness by order of the Censor. The censors were the only check on divorce during the Republic. L. Antonius was expelled from the Senate on account of his unjustifiable repudiation of his wife. A wife *in manu* could not divorce her husband; but if he divorced her, she could require him to release her from the *manus*. The power of repudiation was reciprocal.

By the Julian law (*lex Julia et Papia Pappæ*) if the wife was guilty of adultery, her husband in divorcing her was allowed to retain a sixth part of her dowry (*dos*). If the fault was less serious, he could only retain one-eighth (Ulp. Frag. C. 5, 12, 24).

If the husband were guilty of adultery, the wife could command immediate restitution of her dowry. If the fault was less serious, he must restore the dowry in six months. The penalties ceased if both sides were in fault.

Constantine's legislation was against capricious repudiation, and specified the causes for divorce without incurring penalties.

A woman could repudiate her husband without blame in case he was guilty of murder, or prepared poisons, or violated tombs.

If she divorced her husband on account of being a drunkard (*ebrius*) or gambler (*aleator*), or associating with loose women (*mulier cularius*), she forfeited her dowry and was punishable with deportation.

A husband could divorce his wife without blame: 1. If she were an adulteress; 2. Preparer of poisons; 3. Or a procuress. If for any other cause than one of these three, he forfeited all interest in his wife's dowry; and his first wife, if he married again, could take the second wife's dowry as well.

Honorius and Theodosius ignoring the consti-

tution of Constantine imposed somewhat different restrictions.

If the wife divorced the husband for grave reasons or crime committed by the husband, she could reclaim her dowry and the gifts made to her by her husband, on the betrothal, and could marry again after five years.

For acts of immorality or moderate faults, the wife forfeited her dowry and all interest in the money brought by the husband to the marriage, and was incapable of marrying again.

If no grounds existed for the divorce, the wife forfeited her dowry and betrothal presents, might be deported, and was incapable of marrying again or receiving pardon from the Emperor.

If the husband divorced his wife for a serious crime, he retained the wife's dowry and could at once marry again.

If for immorality, but not crime, the husband gained none of her property, but could at once marry again.

If for mere dislike, the husband forfeited the property he brought into the marriage (*donatio ante nuptias*) and was incapable of remarrying. The constitution of Constantine and Honorius and Theodosius were not retained in Justinian's Code. I cite from them to complete the history of legislative restraint on divorce. These constitutions seem to have fallen into utter neglect, perhaps from their stringency or severity, and milder forms have taken their place. Under Theodosius and Valentinian a wife could divorce her husband without blame if he were guilty of any of the following offences: 1, Treason; 2, Adultery; 3, Homicide; 4, Poisoning; 5, Forgery, etc.; 6, Violating sepulchres; 7, Stealing from a church; 8, Robbery and assisting or harboring robbers; 9, Cattle stealing; 10, Attempting his wife's life by poison; the sword, etc.; 11, Introducing immoral women to his house; beating or whipping his wife. If for any other than one of these offences a wife divorced her husband, she forfeited her dowry and could not marry again for five years.

A husband could divorce his wife for any one of the above reasons, except the eleventh, and also for the following offences, committed by the wife: 1. Dining with men not her relations, without the knowledge or against the wishes of her husband; 2. Going from home

at nights against his wishes
able cause; 3. Frequent
theatres, forbidden by her
added; 4. Procuring abor-
ing baths with men (C. 5
inian repealed the former
resettled the grounds of d
The valid grounds of a div
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The husband's grounds for his wife were: 1. Of any plotting against the disclosing the same to her by the wife (with addition). Attempting her husband's frequenting banquets or baths without the husband's consent; 5. Going home against her husband's wish to her own parents; 6. Going to amusement against the wishes. For any of these reasons if the divorce his wife, he can retain there are no children; and for are, the dowry going on his side he divorces his wife for any of liable under the constitution and Valentinian.

The earliest legal provision of children after the divorce seems to be a constitution of Maximian (C. 5, 24, 1). The according to his discretion. that the divorce of parents should

impair the legal rights of their children, or affect their right to inherit from their father, or to require aliment from him. If the father were guilty of an offence justifying his wife in divorcing him, and she remained unmarried, the children were to be given into her custody and maintained at the cost of the father; but if the mother were guilty, the father had the right of custody. If he were poor, and unable to support them and the mother was rich, she was obliged to take and maintain them. The parties were divested of their marital rights by the death of the husband or wife. Loss of liberty by either husband or wife. After five years since the captive was last known to be alive, his wife could marry again without divorcing her captive husband. Mere loss of citizenship did not dissolve the marriage unless either desired to give up the marriage (C. 5, 17, 1). Since marriage was considered a contract resting on mutual consent, it logically followed that the tie could be broken by the consent of the parties.

Before proceeding any further with our subject, it will become necessary for me to explain to you what is meant by the Modern Civil Law of Europe. I shall have occasion hereafter to speak very often of the Roman Law and the Modern Civil Law. In the 16th and 17th centuries there arose in Holland the classical school of Jurists, which at a later period was succeeded by the systematic and synthetic teachings of the Germans. The influence of the Dutch classical school upon the study of the Roman law was most important. They followed what the Germans termed the "Legal-Ordnung," that is the order observed by the compilers of the Pandects. The Pandects were founded on the writings of Geo. Fred Puchta, Karl Adolf Von Vangerow and Dr. Karl Ludwig Arndts. By the term "Pandekten" or Modern Civil Law is understood the systematic exhibition of the actually existing Roman Law in relation to private rights. These treatises on the Pandects do not embrace the theory of the pure Roman law, but are principles derived from that law applicable to the modern state of thought and civilization. Roman law is in force in nearly all the States of Europe, but in Germany it is confined to the minor States. Those States in which the civil law is adopted are designated "Common law countries." Its

sources are those four component parts collectively called the "Corpus Juris Civilis." Its utility extends so far only as the glossators have declared it to be applicable in practice.

By the modern civil law, when husband or wife gives to the other a just cause of separation, the guilty party suffers a pecuniary penalty. The guilty wife loses her *dos*, so far as she might have reclaimed it after the dissolution of the marriage; where no *dos* has been constituted, she loses one-fourth of her property, the ownership of which goes to the children, the usufruct to the father. In cases of the wife's *adultery*, the penalty is increased to a third. The guilty husband loses the "*Donatio propter nuptias*," and when none has been constituted he forfeits one-fourth of his property in favour of his children, the mother having the enjoyment of the usufruct. When there are no children, the property goes in both cases to the innocent husband or the innocent wife, as the case may be.

The laws in the several Grecian States regarding divorce, were different, and in some of them, men were allowed to put away their wives on slight occasions. The Cretans permitted it to any man who was afraid of having too great a number of children. Among the Athenians, either husband or wife might take the first step. The wife might leave the husband or the husband might dismiss the wife. Adultery on the part of the wife was in itself a divorce; but the adultery, we may presume, must have been legally proved. The Spartans seldom divorced their wives. The Ephori fined Lysander for repudiating his wife. Ariston (Herod. VI, 63) put away his second wife that he might have a son, for his wife was barren. Anaxandrides was strongly urged by the ephori to divorce his barren wife, and on his not consenting, the matter was compounded by his taking another wife, thus he had two at once, which Herodotus observes was contrary to Spartan usage. Whether the divorce was voluntary or not, the wife could recover from her late husband all the property she had brought to him as dowry upon their marriage. The party opposed to the separation could institute an action against the dissolution of the marriage; but of the forms of the trial and its results we have no information.

Adultery was the only cause of divorce

among the ancient Germans, and this vice was by no means prevalent among them, and second marriage on the part of the woman was not in general practice, even upon the death of the husband. Divorce is not mentioned in the laws of the Ripuarians or Salians, but the practice very generally obtained after the Barbarians had settled among the Romans. Although second marriages were discountenanced by the Church they were constantly recommended by Justinian. By 10th Canon of the Council of Arles, which was held A. D. Circ 314, and which was attended by bishops from all parts of Christendom, it was directed that Christians should be exhorted not to marry again during the life-time of their wives, after having divorced them for lawful cause. Flury's Hist. Eccles., tom. iii, liv. 10, c. 14. See St. Paul's Epist. to the Romans, c. vii; St. Paul's Epist. Corinthians, c. vii.

The Ostrogoths permitted divorce if the husband were convicted at law of murder or sorcery or of violating tombs; the wife might be divorced on the ground of adultery, sorcery or acting as a procuress. As to the power of marrying again they were no doubt governed by the Roman law then in effect.

Under the Visigoths, adultery was good ground of divorce, and the wife, if convicted, was delivered by the judge to the husband to dispose of her as he should think proper. The wife might obtain a divorce if the husband authorized or permitted a stranger to offer violence to her person, or if he were guilty of the most detestable of vices. This was subsequently allowed as good cause of divorce among the Franks. (*Vide* Beaumanor, p. 293.) When the wife obtained the divorce she could marry again, but not if divorce was adversely pronounced against her. The Codes of the Bavarians and Lombards permitted the husband to put away his wife for similar causes above specified. However, the precise causes of divorce are not stated in the codes. If a man were willing to forfeiture a certain sum of money, he might put away his wife at pleasure, and take another. Among the Burgundians if a woman, legally married, attempted to put away her husband, she was ignominiously put to death by being stifled with mud. The Franks, besides the above mentioned causes of divorce, allowed in practice various others. If a husband were re-

duced to slavery or compelled to fly the kingdom, the wife was permitted to marry again. Gregory of Tours mentions the circumstance of a man who put away two wives, marrying a woman who took him for her third husband. Merovingian Kings exercised the most unbounded license, taking wives and divorcing them at pleasure.

Charlemagne, by a capitulary inserted in the law of the Lombards (the general laws of the empire), directed that no woman divorced should marry again during the life of her former husband, nor should a man while his former wife was alive. Yet this emperor divorced his wife Bertha, daughter of Desiderius, King of the Lombards, and married Hildegard, by whom he had issue Louis le Debonnaire, his successor. The Anglo-Saxons permitted divorce for adultery; it might be obtained by mutual consent, but then the parties were not allowed to marry again. The Canons forbade second marriage in any case excepting after the death of the former husband or wife. (Lib. Canon Wilk, p. 154.) According to the law of Moses, when a wife finds no favor in the eyes of her husband on account of her uncleanness, he may divorce her and send her away from his house. She may marry again in ninety days; but after she had contracted a second marriage, though she should again be divorced, her former husband which sent her away may not take her again to be his wife, after that she is defiled. About the time of the Saviour there was a great dispute between the schools of the great doctors Hillel and Shammai, as to the meaning of this law. The former contended that a husband might not divorce his wife except for some gross misconduct, or for some serious bodily defect which was not known to him before marriage, but the latter were of opinion that simple dislike, the smallest offence, or merely the husband's will, was a sufficient ground for divorce. This latter is the opinion which the Jews generally adopted, particularly the Pharisees. Christ considered that the law of Moses allowed too great a latitude to the husband in his exercise of the power of divorce. All that could be done was to introduce such modifications, with the view of diminishing the existing practice, as the people would tolerate. The form of a Jewish bill of divorcement is given by Selden *Uxor*

Ebraica, lib. iii, ch. 24. *Vide* Levi's Ceremonies of the Jews, p. 146.

It is probable that the usages in the matter of divorce now existing among the Arabs are the same, or nearly so, as they were when Mohammed began his legislation. An Arab may divorce his wife on the slightest occasion. So easy and so common is the practice that Bruckhardt assures us that he has seen Arabs not more than forty-five years of age who were known to have had fifty wives, yet they rarely have more than one at a time.

By the Mohammedan law a man may divorce his wife orally and without any ceremony; he pays her a portion, generally one-third of her dowry. He may divorce her twice and take her again without her consent, but if he put her away on a triple divorce conveyed in the same sentence, he cannot receive her again until she has been married and divorced by another husband, who must have consummated his marriage with her. By the Jewish law it appears that a wife could not divorce her husband; but under the Mohammedan Code, for cruelty and some other causes, she may divorce him; and this is an instance where Mohammed appears to have been more considerate toward women than Moses. Among the Hindoos, and also among the Chinese, a husband may divorce his wife upon the slightest ground, or even without assigning any reason. She is under the absolute control of her husband—a perfect machinery of obedience. The law of France, before the revolution following the judgment of the Catholic church, held marriage to be indissoluble, but during the early revolutionary period divorce was permitted at the pleasure of the parties when incompatibility of temper was alleged. The Code Napoleon restricted this liberty, but still allowed either party to demand a divorce on the ground of adultery committed by the other, for outrageous conduct or ill usage, on account of condemnation to an infamous punishment, or to effect it by mutual consent expressed under certain conditions. By the same Code a woman could not contract a new marriage until the expiration of two months from the dissolution of the preceding. On the restoration of the Bourbons a law was promulgated, 8th May, 1816, declaring divorce to be abolished; that all suits then pending

for divorce, for definite cause, should be for separation only, and that all steps then taken for divorce by mutual consent should be void, and such is now the law of France.

Divorce in Holland may be obtained for adultery and for malicious desertion. If other causes can, by an extended interpretation, be brought within the reason of the first two causes, they are held sufficient. Thus the commission of an unnatural crime, or perpetration of imprisonment, are good grounds of divorce. Besides the divorce, which entirely dissolves the marriage, there is also a provisional separation introduced from the canon law, termed a separation of bed and board, cohabitation and goods. There must be lawful reason set forth in the application tending to show that the continuing to live together is dangerous or at least insupportable. In this proceeding the intervention of the authority of the judge is requisite, who, after a summary inquiry may confirm the agreement in this respect. President Von Bykershoek observes: "It were to be wished that, from the too easy compliance of the magistrates, separations were not so frequent as they at present are." If such a separation includes a division of the goods, the community of goods induced by law on the marriage is suspended, and the marital power of the husband thereby ceases. Should the parties come together again, the former rights and consequences of marriage revive. When the marriage has been dissolved on account of adultery or malicious desertion, the innocent party may marry. And it is also permitted to the guilty party to marry again, while the other remains unmarried, except to the person with whom the adultery is committed.

This seemed to have a very salutary influence, since divorces there were very rare, but the tide of contiguity seems to have brought with it many elements of demoralization and marital dissatisfaction in relation to the marriage tie.

In Spain the same causes affect the validity of a marriage as in England, and the contract is indissoluble by the civil courts, matrimonial causes being exclusively of ecclesiastical cognizance. (*Instit. Laws of Spain.*) At the reformation the Protestants rejected the Papal tenet, that marriage was a sacrament and indissoluble. In some Protestant countries, however, the ecclesiastical courts clung to the

Canon law of Europe, and down to a recent date the laws of England did not allow a marriage once validly contracted to be rescinded by divorce. Where there was no canonical impediment nothing short of an act of Parliament could authorize divorce *a vinculo matrimonii*; private acts were occasionally obtained by persons of rank and condition who could afford expense, to dissolve marriages for adultery on the part of the wife, and for adultery accompanied by aggravated circumstances on the part of the husband. So deeply rooted was the principle in the law of England, that in *Lyly's* case where the parties were married in England and divorced in Scotland, and the husband subsequently married in England, he was tried and convicted there for bigamy, the conviction being affirmed by the unanimous opinion of the common-law judges.

From such a state of the law, it practically resulted that divorce, on what were deemed sufficient grounds, though always obtainable by the rich, were denied for the most part to the poor. This great injustice has been remedied by the establishment of the court for divorce and matrimonial causes, which went into operation in 1858. *Vide* Act 20 & 21 Vict., c. 63, § 27; *Vide Shaw v. Gould*, L. R., 3 H. L. 55. As to the effect of a decree of divorce by a secular tribunal in the case of an English marriage between English subjects, there are now two ways of relief, viz.: by divorce or dissolution of marriage, which corresponds to the old divorce *a vinculo matrimonii*, and by a judicial separation or divorce *a mens et thoro*. The former is a complete severance of the marriage tie and can be obtained on the ground of the husband's adultery. It can be obtained by the wife on the grounds that since the marriage her husband has been guilty of incestuous adultery, that is if committed by the husband with a woman whom if the wife were dead he could not marry, by reason of her being within the prohibited degrees of consanguinity or affinity, 20 & 21 Vict., c. 85, § 27), or of bigamy with adultery, or of rape, or an unnatural crime, or adultery accompanied with such cruelty as would have formerly entitled her to a divorce *a mens et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. A judicial separation which has all the effects attendant on a divorce *a*

mens et thoro under the former law may be obtained by either party on the ground of adultery or cruelty or desertion without cause, for two years or upwards. If the petitioner has been accessory to or connived at the adultery, or has condoned the offence, or if there has been collusion between the parties, no decree of divorce can be granted. It is entirely in the discretion of the court whether it will pronounce a decree or not if the petitioner during the marriage has been guilty of adultery or unreasonable delay in presenting the petition, or cruelty to the other party to the marriage, or having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

After the decree of divorce has become final, the parties are at liberty to marry again, as if the previous marriage had been dissolved by death. After a decree of judicial separation the wife is considered as a *femme sole* in regard to property she may subsequently acquire, or which may come to or devolve upon her, and she may sue or be sued as if she were unmarried; and on the other hand her husband is not liable for her debts, except for necessities supplied to her when she fails to pay the alimony decreed to her by the court.

[To be concluded in next issue.]

CURRENT EVENTS.

ENGLAND.

DULLNESS OF BUSINESS.—The stream of reports would not indicate a great falling off in the amount of business before the English Courts; but it is nevertheless true that the profession in England are complaining of the dullness in business at the present time. According to the *London Law Journal*, firms of solicitors of the highest position have no work in their common-law department; and this falling off is specially noticeable as regards commercial matters. The utter stagnation of trade explains the absence of litigation on charter-parties, bills of lading, marine insurance, and other mercantile contracts; while re-

covery of debts by action is continually frustrated by liquidations. For many years there has been no such dullness in the offices of solicitors and the chambers of counsel. In conveyancing of the ordinary type there is almost equal depression. At present the general prospect is dismal, and there are no visible signs of a change for the better.

ANNUAL CONFERENCE.—The next annual conference of the Association for the Reform and Codification of the Law of Nations is announced to be held in the city of London. The Lord Chief Baron will preside. The Lord Mayor has undertaken to extend the hospitalities of the Mansion house to distinguished foreign jurists and other visitors, and the corporation will be asked to allow the meetings to be held in the Guildhall.

SALE AND MORTGAGE OF REAL ESTATE IN ENGLAND.—A correspondent of the N. Y. *Evening Post*, writing from England under date of the 23d ult., gives the results of investigations made by him into English methods of transferring and witnessing titles to real estate. In America, when a sale of real property has been negotiated, the ceremonies attending the transfer are considered of little moment, but in England the agreement for sale is only the first stage of a tedious proceeding. The contract of sale of lands there requires a showing of title, and if the estate is large and valuable, the buyer will demand the production of the title deeds for sixty years back, though in sales of small lots, proof of title for twenty years will usually be accepted. But if the vendor has carelessly agreed to sell a tract of land without having a detailed specification in the contract of sale of the exact deeds he can produce, the purchaser may require a showing of the whole title for sixty years. In a country where there is no record of deeds, the expense of obtaining such a showing will often amount to more than the price of the land. In such a case, the vendor has but one mode of escape, namely, the payment of a large fee to the purchaser's solicitor, ostensibly for looking up the title, but really as a bribe to induce him to pass the title as satisfactory. During the examination of the title deeds, the solicitors for both parties are present, and the papers are not permitted to pass out of sight

for a moment. The lack of a system of records in a large part of the country renders the forging of deeds easy and holds out a temptation to such acts. In the negotiation of mortgages, the same procedure is necessary as in the case of sale, the title deeds passing into the hands of the mortgagee, where they remain until the mortgage is paid.

UNITED STATES.

WHAT LAWYERS HAVE DONE.—We extract the following from a speech made by the Hon. Henry Edgerton, in the Constitutional Convention of California, on the 22nd of November. He said, addressing the President;

"SIR: It was the skill and wisdom of lawyers that laid the foundation and reared the superstructure of that benign Government under which we sit in this hall. It was an immortal company of lawyers whose statesmanship, supported by the deathless valor of its heroic armies, kept that government firm on its foundations in the most tremendous shock of war the universe has ever felt. It was a lawyer, who at the call of his country in the hour of its direst peril, left the walks of his profession and became the greatest organizer of war the world has ever seen. But, sir, I need not stand here and call the roll of its heroes. In the Senate, upon the Bench, at the Bar, in the camp, in the stricken line of battle, always and everywhere when civilization and the rights of mankind have been assailed, that profession has been in the vanguard of their defenders. The bones of its martyrs are at the base of every great monument which marks the progress of the race, and there is not a legal security, nor a constitutional guaranty of liberty or labor that is not illustrated by their genius, or consecrated and cemented by their blood."

CANADA.

Lawyers in Toronto complain that the business they receive from the country is not always paid for. One gentleman states that he received a brief with a cheque, but the latter was returned, endorsed "no funds."

The Legal News.

VOL. I. DECEMBER 28, 1878. No. 52.

OUR FIRST YEAR.

With the present number we bring our first volume to a close. The time has not been a favorable one for the inauguration of new enterprises, and this has had its effect upon the success of the *LEGAL NEWS*. We have, however, attained a circulation as extensive as we ventured to expect would be reached within the first year of existence. The volume is a large one, and was issued at an extremely low price for a legal publication, the object being to bring it within the means of a large circle of readers. In this we have succeeded to a considerable extent, but we regret that we cannot say the same as to the advertising patronage which the publishers hoped would be extended to a journal of the character and circulation of the *LEGAL NEWS*. The absence of such support has made the journal unremunerative both to the publishers and the editors. We trust that this will be remedied during the coming year. We appeal with confidence to our readers to aid us in bringing the journal under the notice of those whom it does not reach at present. And we would further ask them to give us that class of advertisements which they control, and which would be especially appropriate to the *LEGAL NEWS*. This is the first attempt in Canada to give the profession a newspaper peculiarly their own, and while the publishers cheerfully undertake the burden for another year, it will ultimately depend on the profession whether the work is to be continued or not. It will be our aim during the coming year to add to its usefulness and value, and if our readers second our exertions, we feel confident of success.

TELEGRAPHIC MESSAGES.

We have observed a notice of a recent decision by an English Judge, holding that telegraphic messages are privileged communications. We shall refer to the case later, when the full report is before us. It has been the practice in the courts of the Province of Quebec

to order the production of telegrams. We may refer to the case of *Leslie v. Hervey*, in 1870, before Mr. Justice Mackay, and to the authorities there cited: 15 L. C. Jurist, pp. 9, 10, 11. The Court held that telegrams which have passed between a principal and his agent are not privileged communications, in a suit in which that principal is a party. Mr. Justice Keogh, recently deceased, while trying the Dublin Election Petition in 1869, compelled the manager of the Magnetic Telegraph Company to produce the messages that were dispatched during the election by the various persons engaged in it.

The London *Law Times* remarked thereon: "In strict law this is permissible. Telegraph messages are not privileged communications, even in the hands of the Telegraph Company. But it is a very important question whether they ought not to be made such. What are they, after all, but letters without an envelope? The same communication sent through the post office would be practically privileged in the transit. If the postmaster were to break the seal and read it, he would not be permitted to give evidence of its contents. The telegraph clerk is only as a postmaster to whom a paper is confided, which the necessity of the case demands that he should read and preserve. It is necessary to the public security that messages should be held in as strict confidence by the officials as letters. No harm could possibly come of conferring upon them, when delivered to the company, and while in the possession of the company, the privilege of strict secrecy; or, if an occasional inconvenience should arise, the benefits would vastly exceed the evil of such a provision."

FISET v. FOURNIER.

We have several communications with regard to the judgment in this case, and in particular an interesting letter from Mr. Charles Pacaud, of counsel for the plaintiff. In this letter Mr. Pacaud ably supports the view that the prescription acquired had been renounced to by the defendant. But strange to say, Mr. Pacaud does this by reference to the old law and authorities, and without citing *Walker & Sweet* or the other decisions since the Code. As the matter has been settled by positive authority,

we do not think it desirable to reopen the question in these columns. Mr. Justice Sanborn, who dissented in *Walker & Sweet*, said all that there was to be said on the one side, and the judgment of the Court of Appeal has finally settled the law in the opposite sense. We do not see that it would be possible for a Judge sitting in a lower court to disregard the authority of that case, if it were cited before him. We shall, therefore, content ourselves with an extract from Mr. Pacaud's letter, which is explanatory of the action brought.

He says: "The action in that case (*Fiset v. Fournier*) was not founded upon the promissory note, which the plaintiff acknowledged by his declaration was prescribed, but it was based upon the acknowledgment of the debt and the promise to pay the same, made by the debtor in presence of a witness in June or July last.

"It seems to me that this acknowledgment and promise were sufficient to constitute a new obligation on the part of the debtor, and that that was a perfect contract in itself according to the rules established by arts. 982, 983 & 984 C. C., which contract the plaintiff could get enforced in law.

"The promissory note was merely mentioned in the declaration, to show how the debt had originated. The action did not rest at all upon the note, which was absolutely prescribed and no action could be brought upon it, but it rested upon the acknowledgment of the debt and the promise to pay the same made by the debtor.

"Prescription is merely a presumption of payment. The debtor may renounce to the benefit of that prescription by acknowledging that he owes the debt, and art. 2227 C. C. expressly says: 'Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or debtor makes of the right of the person against whom the prescription runs.'"

Then follows a reference to the works of French authors. The lengthy discussions to which this question has given rise, and the different opinions which have been advanced, show that the point is one of serious difficulty. A word or two in the Code would have placed the matter beyond all doubt; but we consider that the Code has now been interpreted in a manner which does not admit of further debate.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Dec. 20, 1878.

JOHNSON, J.

LEONARD V. LEMIEUX.

Surety—Lease terminable on Notice.

A person who is surety for a tenant holding under a lease terminable on giving six months' notice, cannot exercise the right stipulated in favor of the tenant, if the latter fails to exercise it.

JOHNSON, J. The defendant is *caution solidaire* for the rent of a house, together with the tenant, who took it under a lease for five years, with a right to terminate at the end of any one year by giving three months' notice. This right the tenant never exercised; but at the end of the first year continued to occupy, and on the 1st June there were six months' rent due, and the defendant being sued pleads that he gave notice last January, that he wanted to terminate his obligation; and it was maintained before me that he had this right. I can only say now, as I said at the hearing, that if he has, a tenant who apparently would not be trusted without furnishing security, will find himself able to occupy the place for the whole term of the lease without any security whatever. Plea dismissed. Action maintained for amount demanded.

Taillon for plaintiff.

J. E. Robidoux for defendant.

LANDA V. POULEUR.

Damages for Malicious Prosecution—Bad reputation of Plaintiff—Compensation.

1. Proof that the plaintiff had been formerly convicted of attempting to have carnal knowledge of a girl under eleven years of age will be admitted in mitigation of damages, in an action for malicious prosecution for bigamy.

2. A judgment obtained by defendant in right of his wife against plaintiff may be pleaded in compensation of damages claimed for such malicious prosecution for bigamy.

JOHNSON, J. This is a somewhat singular case. The parties are both of them Belgians, domiciled here; and the plaintiff's action is for damages, on account of the defendant having caused his arrest and prosecution for

bigamy. Confusion and prolixity are not uncommon; but here, I think, both have been abused. The plaintiff commenced his action by process of *capias*, and that process is contested at the same time as the merits of the action, by a consent of the parties. The plaintiff laid his damages at \$10,000; but the Judge who gave the order fixed the bail at \$400. There are the usual allegations of malice and want of probable cause; and, besides these, the plaintiff avers that the defendant knew very well that the charge of bigamy he was making was unfounded, and that he was actuated by express malice in making it. The plaintiff had to go to jail, and the case against him was sent to the Queen's Bench, where the Grand Jury threw out the bill. The defendant's pleas to the present action begin by denying the formal averment of the plaintiff that he is of good character and repute, and by setting up on the contrary, in a specific manner, that his reputation is *gravement entachée*.

The second thing pleaded by the defendant is that he had probable cause for doing as he did; and, in the third place, the defendant sets up a plea of compensation founded on three distinct grounds: 1st, on the damages caused to him by the arrest of his person in this very case, which began, as I have said, by a writ of *capias*; 2nd, on the damages he suffered by an unfounded prosecution instituted against him by the plaintiff for compounding a felony, and, 3rd, this plea of compensation sets up a judgment for \$150 against the plaintiff in this case obtained by the defendant in right of his wife. The answers are general. I have, therefore, to see, first, whether the proof supports the essentials of the plaintiff's action; 2nd, whether the defendant's pleas are well founded, and to what extent; and 3rd, whether the process of *capias* is to be set aside under the evidence. This evidence was given before me, and lasted several days. I took careful notes, and have referred besides to the extended notes of the shorthand writer. I am of opinion that there was an arrest and a prosecution for bigamy against the plaintiff, and at the defendant's instance; that he is responsible for them, and that they were undertaken without probable cause, and with malice on the defendant's part. The facts are few: the plaintiff was married to Antoinette Vanden Daden at Brussels, on the

30th of January, 1870; and the marriage was dissolved at Laeken on the 31st of March, 1876; or rather the dissolution was then pronounced; the divorce itself having been granted at Brussels on the 6th of October, 1875. On the 21st of January, 1877, the plaintiff was married in Montreal, in the Roman Catholic Church, to Miss Octavie Viau, having previously been married to her in the United States. There had been difficulty here in getting the authorities of the Roman Catholic Church to marry him, and correspondence with Rome took place, and before the answer came, Landa and Miss Viau went to the United States, and there got married; and though the dispensation from Rome came at last, it was not required,—Landa, who had been a Jew, having in the interval professed the Roman Catholic faith. There is no doubt of course that if Landa came here and got married here, while his previous marriage in Belgium, (supposing it to have been a lawful marriage there) was subsisting, he would have committed the offence of bigamy; and so also, if he left this place to contract a second marriage in the United States, the previous marriage still subsisting, and came back here and was taken into custody here, he would have committed the like offence, and could have been prosecuted for it here. The defendant made his deposition before the Magistrate on the 12th of February, 1878. More than a year had elapsed since the second marriage here in Montreal. There had been deliberation before this last marriage. The plaintiff had consulted the Rev. Mr. Sentenne, who had consulted his Bishop, and both the ecclesiastical authorities and the man himself acted with caution and prudence, and the circumstances were discussed—at all events as between Landa and Mr. Sentenne, the priest, and if they were not known to the defendant he could easily have ascertained them by enquiry. I think there is no difficulty as to the proof of express malice on the part of Pouleur. He went to Mr. Sentenne to get from him the extract of marriage, and he was told by Mr. Sentenne that the second marriage was valid. This should have put him on his guard. He was protected to a certain extent in bringing a public prosecution for a felony—that is, as long as he can be supposed to have acted with upright

motives for the public good ; but the circumstances in evidence show that there was the worst state of feeling between these two men, and it is impossible for me to believe that he acted without personal ill-will. That alone, however, would not support this action. The most deadly enmity in the prosecutor is not at variance with the clearest truth of the charge, and, therefore, there must be want of probable cause. That is a mere question of law for the Court, and I do not hesitate an instant in saying that there was a total want of probable cause for bringing the charge of bigamy. The law constituting this offence is quite plain :—32-33 Vic., c. 20, Sec. 58 : “ Whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere, is guilty of felony, and shall be liable, &c., &c., and any such offence may be dealt with, enquired of, tried, determined and punished in any part of Canada where the offender is apprehended, or in custody, in the same manner in all respects as if the offence had been committed here : provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada, and leaving the same with intent to commit the offence, or to any person whose husband or wife has been continually absent from such person for the space of seven years then last past, and was not known by such person to be living within that time, or shall extend to any person who at the time of such second marriage was divorced from the bond of the first marriage, &c., &c.” The dissolution of the first marriage is proved here beyond doubt. We have the judgment with the seal of the Court, and the evidence of the Belgian consul as to the authenticity of it ; and it cannot be seriously contested. The defendant says in one of his pleas that he did not know of the dissolution of the first marriage : but the existence of the first marriage was a constituent in the offence he was charging the plaintiff with, and it would be monstrous to say that any man who has married twice (which by-the-bye is the original and strict meaning of the word ‘ bigamy ’ may be prosecuted for a felony without any responsibility on the part of the prosecutor, and

without any obligation on his part to make enquiry. If he chose to make the charge without knowing the facts, he must take the consequences. Therefore, up to this part of the case, I am with the plaintiff, and if it stopped here I would give him substantial damages ; but the case does not stop here. The defendant has said in one of his pleas, as I have already stated, that the reputation which the plaintiff sets up as having been tarnished by the prosecution for felony was not such a very good reputation after all. It has always been allowed to urge this in mitigation of damages, because of course the amount of injury suffered is not so great in such a case. If there are spots already, one more will not make so much difference, and the defendant has proved this in my opinion. He has proved by several most respectable witnesses—his and the plaintiff’s own countrymen here—that the plaintiff is held in very little estimation. This evidence of course must be justly appreciated. It seems to show that the plaintiff is not liked by his own countrymen, and perhaps so far it does not amount to very much : but it is there, and it goes for something, though, if there were nothing else, it would not go very far ; but there is something else, and something very serious too. There is the plaintiff’s own admission, when the defendant called him as his witness, that he had been publicly convicted in his own country of an attempt to have carnal knowledge of a child under eleven years old, (*attentat à la pudeur d’une fille de moins d’onze ans.*) Therefore, if this was known, and it probably was known to his fellow-countrymen here, it is not surprising that they should hold his reputation rather cheap. It must be borne in mind that we are dealing with a question of character as affected by a prosecution for felony here, and it appears that the person complaining was a misdemeanant in his own country, and, after one year’s imprisonment, was pardoned. No doubt that pardon was equivalent to undergoing his sentence, and its effect is that he can’t be spoken of again as guilty of the offence. That has always been the English law, and it was so held very lately in a case of *Leyman v. Latimer* in the Court of Appeal at Westminster, in an appeal from the decision of Barons Cleasby and Pollock in the Exchequer Division, who held that it is libellous to call a man a felon who has undergone his sentence, and is thereby placed in the position

of a man who has received the Queen's pardon under the great seal, and the decision of the Barons was affirmed. No doubt, therefore, that if this was an action for libel for calling this man a felon or a misdemeanant (whatever his offence may have been by the laws of Belgium,) the pardon would be an answer to the charge that such was his status; but it is not a question here whether he could be lawfully called a felon or a misdemeanant for what he did in Belgium; but merely whether his character has been lowered by what has happened there; whether, to use the words of the plea, it has been '*gravement entaché*;' and I must say that I think it must be taken as a very grave inconvenience for this man, who sues for damages on the ground that a spotless reputation has been tarnished, to be obliged to admit that it has already so large a spot upon it. Mind, I am not discussing the legal effect of the pardon, or of undergoing the sentence—that is what is decided in the case I have just mentioned—but I am considering the effect in common estimation of an admission that such a thing took place. There was a statement made by the plaintiff in his evidence that would have come near being serious for him if the prosecution had been for going to the States from this place, and being married there. He was asked whether the divorce had not been granted on the 30th of March, 1876—which would have been after his marriage in the United States, as he admits that took place on the 12th November, 1875—but his answer shows, as do the official documents, that the 30th March, 1876, was the date of registration of the divorce at Laeken, the sentence having been pronounced at Brussels on the 22nd of October, 1875, three weeks before the marriage in the United States; but the charge, as brought by the defendant, was for bigamy committed by his second marriage here—not by his leaving here to get married in the States. If it had been the latter, the question of the effect, according to Belgian law, of the judgment *en première instance* before its registration at Laeken would have arisen. As far as the plaintiff's action alone is concerned, therefore, I should find that he is entitled to damages; but my estimate of those damages would be very seriously lowered by what he has admitted with respect to his career at home, which evidently affects his character here among his fellow-countrymen.

Then, the other pleas of the defendant must be looked at. As to the damages that he sets up against the damages claimed from him, his right to set them up at all is not questioned by the other party, and I do not do more than express my doubts whether it could be properly set up. It is not unusual to oppose damages to damages in cases of *injure verbale*; but it is the first time I have seen a demand of any kind, whether for debt or for damages, commenced by a writ of *capias*, and in which the damages done by executing the writ on the person of the defendant are set up in compensation. As the parties have said nothing about it, however, I have considered the proof, and I do not see that the defendant has proved any damage, either arising from his arrest in this case, or from the prosecution for compounding a felony, of which there is no legal proof whatever. There remains the judgment in favor of the defendant's wife, which he has a right to set off against any damages to be awarded to the plaintiff. Upon the whole, having considered every part of this case as scrupulously as I am able, I award \$100 damages to plaintiff, because, notwithstanding the unfortunate *fettersure* upon his character, the defendant had no right to accuse him of the felony; but of course the effect of allowing the compensation under the judgment will be to put both parties out of court, the costs being also *compensés*. The defendant, by having prosecuted the plaintiff for bigamy without probable cause, will thus lose part of the amount of the judgment he holds against him. If there had been no judgment I should have condemned him to pay so much money, and I do not see the difference in principle between the one and the other, although I find a case in the 13 L. C. Jurist, p. 229, (*Jordesau v. McAdams*) distinctly holding that this cannot be done, the damages against which the compensation is set up not being *claires et liquides* when the compensation was set up. That was an application of the text of the law in which I cannot concur. Where the debt demanded, and which it is sought to extinguish by compensation, is liquidated, I can understand why the creditor is not to be delayed, while his debtor sets about proving damages not yet ascertained, but to reverse the case, and say that if a plaintiff sues me for damages, and all the time owes me a debt which ought to be so much

cash in my pocket, I may not pay him his damages with his own overdue obligation for more, is what I must defer doing, until a higher Court has said that I am wrong; and probably afterwards. Of course, it is unnecessary to say anything as to the *capias*, when the plaintiff's damages are extinguished by compensation.

Prevost & Co. for plaintiff.

O. Augé for defendant.

LEDUC *et vir* v. DESMARCHAIS.

Prescription—Claim of Sick Nurse.

The claim of a sick nurse, for services rendered as such during a last illness, is prescribed under Art. 2262, C. C. by the lapse of one year, and the debt being absolutely extinguished after the lapse of the year, the Court is bound to take notice of such prescription though not pleaded.

JOHNSON, J. In this case, I differ from the law of both of the counsel in the case. It is an action to recover remuneration for services rendered as sick nurse in a last illness, which appears to have been of a peculiarly distressing and revolting description, and it is taken against the executor of the wills of Dame Scholastique Leduc, and of her husband, both deceased. The services were rendered from the 17th of April, 1874, to the 15th of January 1875, when the wife died, the husband surviving nearly two years, until December, 1877, and both leaving wills dated in December, 1874; the former making the plaintiff a legacy of \$400, and the latter one of \$50; but these legacies have been renounced by the plaintiff. The only plea on which any question arises is a plea of prescription. It alleges a lapse of more than three years between the services and the bringing of the action; and under this plea the defendant's counsel wanted to apply the two years' prescription under Article 2,261. The plaintiff's counsel, on the other hand, contended that it was only the five years' prescription under Article 2,260 that could apply. For the defendant it was said that the case of the sick nurse, or *garde-malade*, came under No. 3 of Article 2,261—"Salaires des employés non réputés domestiques;" but it was overlooked that there were the words added, "*et dont l'engagement est pour une année ou plus.*" Marcadé in commenting Article 2,272 of the French code, which enacts the one year prescription against doctors, assimilates the case of *sages*

jemmes to theirs, on the ground of scientific knowledge; but he is careful to add: "*si en est autrement des gardes-malades: ce sont des femmes de journée; des gens de travail, rentrant sous l'article précédent;*" that is subjected, under the French code, to the 6 months' prescription. Our code is entirely different from the French. Here we have the five years prescription as to physicians, and perhaps that may be extended, when the case arises, to midwives according to Marcadé's idea, and to our modern trained nurses for the same reason; but I give no opinion as to those cases now. The plaintiff's argument for the 5 years rule is untenable. It is not because the article 2,003 gives a privilege to the charges of physicians, apothecaries and nurses upon the assets of the estate, that the same limitation of action exists in all those cases. The privilege may be taken for granted if the debt exists; but it is the existence of the debt,—not the privilege—that is in question under the plea of prescription. I have said I take a different view of this case from that of either of the learned gentlemen engaged. Art. 2,262 enacts a prescription of one year in three specified cases; and sub-section 3 of that article is "for wages of domestic servants, &c, and other employees who are hired by the day, week or month, or less than a year." I have no doubt, therefore, that though the one party contended for the two years' prescription, and the other for the five, both are wrong, and the plaintiff's action (though it has not been pleaded, or contended for in argument, is really prescribed by one year. I am obliged, under the circumstances, to give the benefit of the law to the defendant. In all the cases mentioned in articles 2,260, 2,261 and 2,262 the debt is absolutely extinguished, and no action can be maintained, whether it be pleaded or not. I do this with great regret under the circumstances, and I dismiss the action without costs, because the precise point on which I dismiss it was not raised.

Loranger & Co. for plaintiff.

T. & C. C. De Lorimier for defendant.

LEBLANC v. LEBLANC *et al.*

Parent and Child—Action for Maintenance—Children not liable in solido—C.C. 169.

The obligation of children to support an indigent

parent is not joint and several, but each child is condemned to contribute in proportion to his means.

JOHNSON, J. In this case an old father, nearly blind, asks bread from his children, four in number—one of them described as a "commis," two others as "marchands," and the fourth a married daughter with her husband. The plaintiff alleges in his declaration that his wife is still living, and has no means of subsistence. The defendants plead, 1st, that the plaintiff's wife is not living with him, but that they are supporting her; and secondly, they plead that they are too poor to pay in money, but are willing to receive their father each in turn. Their obligation to support their parents is not diminished because their mother is obliged to leave her husband's house, owing probably to his inability to support her. The father is charged by law with the obligation of supporting his wife, and can maintain an action for the joint support of himself and his wife, and she can return to him at any time and force him to support her. One of the defendants has been examined on behalf of the others. They have a common defence, and I am not disposed to allow them to call one another to support it. The practice has never been perfectly settled in this Court as to the solidarity of the children's obligation. It appears to have been the rule acted on by most of the judges to apply the principle of solidarity in its entirety. I have known many such cases, and certainly they are not without authority to support them. Demolombe, 4 vol., No. 63, gives all the old and the modern authorities on the one side and on the other. But if we apply simply the rule of solidarity, how shall we apply Art. 169 of the civil code, which is not new law? "Maintenance is only granted in proportion to the wants of the party claiming it, and the fortune of the party by whom it is due." Demolombe comments, Art. 208, C.N. (the same as our Art. 169), and shows that the obligation is divisible. I know of no case in which the divisibility has been pleaded by a defendant, and has been held not to exist. I therefore apply the law as I find it; and make these several children pay according to their means. The plaintiff though old can still earn something, and though he is destitute, his children are also poor, and can only pay according to their means. One of them [Alphonse] is better off than the rest. He can

pay \$5 a month. The others will pay \$2. In the case of *Laplante v. Laplante*, three years ago, I maintained the same principle of non-solidarity.

Bonin & Co., for plaintiff.

Sarasin for defendants.

THE CORPORATION OF VERDUN v. LES SŒURS DE LA CONGRÉGATION DE NOTRE DAME DE MONT-RÉAL.

Art. 712, Municipal Code—Religious and Charitable Institutions—Exemption from Taxation.

The property known as Nuns' Island, occupied by the Nuns of the Congregation of Notre Dame, and the products of which are devoted to the maintenance of that religious community and other establishments of a religious and educational character, is exempt from taxation under 712, Municipal Code, which exempts properties belonging to Fabriques, or to religious, charitable or educational institutions, and not possessed solely by them to derive a revenue therefrom.

JOHNSON, J. I thought at the hearing that there might be a question of jurisdiction here; but I find that Art. 952 of the Municipal Code authorizes both school and municipal taxes to be sued for in this Court, when the municipality, at the request of the commissioners, asks for both together, as they do here. On the merits there is only one point, but it is a point of very grave importance both as regards the powers of municipalities to tax, and also as regards the rights of certain religious and educational institutions. The plaintiffs sue for \$102.60, composed of two items, the first being \$57.60, imposed by the Council on the basis of one twenty-fifth of a cent on the dollar on the assessed value of the defendants' taxable real estate there; and the second being \$45 for school tax. The property in question is commonly known as the Isle St. Paul, or the Nun's Island; and the plea of the defendants is that they hold as a religious community of women for purposes of charity and education, the lands being used principally for pasturage, and the whole occupied for the ends for which they were established, and not possessed solely to derive a revenue from it; and therefore that the property in question is exempt from taxation. There is no doubt that in the first Parliament holden in Lower Canada, property possessed by such persons, and for such objects, was exempted from certain taxes. In 1796, the 36th of the King,

c. 9 was passed to provide for the making, repairing and altering the highways and bridges in the province; and the 61st section provided that, "no lots, houses, or buildings occupied by any of the religious communities of women" should be assessed under that Act. That section also exempted grounds used for pasture without the walls of Quebec and Montreal. Three years later that Act was amended, and by the 39 Geo. III, c. 5, sec. 20, it was enacted that the grounds outside of the cities that had been exempted under the first act should in future be assessed; but again, the properties of the religious communities of women were specially excepted from the operation of that amendment. The state of the law after that, until the passing of the municipal code, is irrelevant, because whatever it may have been, the municipal code repealed it either expressly or by implication, and made special provision for this subject by article 712. There are five classes of property exempted from taxation by that article of the Municipal Code. The third class of exemptions mentions expressly "properties belonging to Fabriques, or to religious, charitable or educational institutions, or corporations for the ends for which they were established, and not possessed solely by them to derive a revenue therefrom."

The property in question now consists of about eight hundred arpents of land of which two-thirds are arable land and pasture, and the rest wood land. The buildings enclose about six arpents. The defendants were incorporated under letters patent issued by Louis the 14th, King of France in 1671, and they have possessed for more than a hundred years. The products of the island are devoted exclusively to the maintenance of the institution, comprising not only the establishment on Nun's island; but also the mother establishment, and twenty-one others on the island of Montreal, giving gratuitous instruction to over four thousand children, requiring instructresses who must be fed, clothed and lodged. The question for me is whether the defendants are, in the words of the law, a religious, charitable or educational institution, or corporation occupying for the ends for which they were established the property now sought to be taxed, and not possessing it solely to derive a revenue therefrom. From the evidence and the terms of the letters patent, it appears

to me quite certain that they come completely within the meaning, and, indeed, within the express terms of the exemption in the municipal code; and, that, therefore, their plea ought to be maintained. I cannot see the slightest ground for saying that the final articles of the municipal code affect Art. 712 in any manner. The intermediate legislation between the dates of the two old statutes of Geo. III. and of the Municipal Code, contain exemptions of the same nature, though, perhaps, not of the same extent; and it was observed with truth, in the present case, that there is no school actually on the Nun's Island. Under the Municipal Road Act (Con. Stat. L. C., ch. 24, Sec. 58), that argument would have had more force; for the 58th section only exempts the *public buildings intended inter alia for the purposes of education, and charitable institutions and hospitals, and the lands on which such buildings are erected*. That, however, is repealed, and the case rests upon No. 712 of the Municipal Code, and it seems clear that the conditions of exemption required by that article, concur in the present case. The establishment on Nun's Island is subordinate to, or rather co-ordinate with, the general objects of their institution, which are also the objects for which it was established; and the property is not held exclusively to get revenue from it. The plaintiff's action, therefore, is dismissed with costs.

Macmaster & Co. for plaintiffs.

Lacoste & Co. for defendants.

Ex parte WAIT, Petitioner for certiorari, and
BREHAUT, P. M.

Certiorari—Summary Conviction.

No certiorari lies for a defect of form from a conviction for an offence within the meaning of the Summary Convictions Act, (32-33 Vict. c. 31) where the merits of the case have been tried, and the defendant has not appealed under section 60.

JOHNSON, J. The conviction brought up under this writ is a conviction by Mr. Police Magistrate Brehaut for having sold a number of pails of lard with the counterfeited trade mark of the firm Fairbanks & Co., of Chicago. The act under which the conviction took place is the 35 Vic. c. 32, entitled "An act to amend the law relating to fraudulent marking of merchandise." The 15th section enacts that penalties incurred under the Act may be recovered by action of debt in any Court of record, or before two

justices of the peace by a summary proceeding. The sixteenth section provides that where the summary proceeding is adopted, the offence is to be deemed one within the meaning of the summary convictions Act (32-33 Vict. c. 31), and to be governed accordingly. In the present case the summary remedy was taken, and the conviction adjudged Wait, the present petitioner, to have forfeited to our Sovereign Lady the Queen the value of the thing sold and \$20 penalty and the costs, according to the Act first cited. The information was laid by Ewan McLennan and it is said, and said truly, that it does not ask for the forfeiture in terms, and does not profess on the face of it to be made on behalf of our Sovereign Lady the Queen; but merely to be made by the complainant as agent for the firm defrauded, and to conclude by a "wherefore complainant asks for justice in the premises." The constructive want of jurisdiction of the police magistrate is urged in every conceivable form; but the substance of the whole is that the conviction adjudges to Her Majesty the value of the thing sold and the penalty and the costs, without their having been asked for on behalf of Her Majesty, and, on general principles, this would appear to a fair enough objection. But the police magistrate was here administering a comparatively recent statute, and whether he was right or whether he was wrong in not exacting that there should be a technical averment that the complaint was made on behalf of Her Majesty, and a technical conclusion asking that the sum and the penalty be forfeited to Her Majesty, there is no doubt that very extensive powers are given to magistrates under these modern acts, and a very extensive discretion is vested in them for the purposes of substantial and speedy justice, and the prevention of technical obstruction to its administration. Under the Summary Convictions Act, which is the one we are to resort to here, there is to be an information laid, and a summons issued; and then, by section 5, we find that no objection is to be allowed to any information, complaint or summons for any alleged defect therein, in substance or in form, or for any variance between the complaint and the evidence; but the magistrate can, if he thinks that the person summoned has been misled or deceived, adjourn the case on such terms as he may think fit. The magis-

trate, therefore, and the magistrate only is the person vested with this large discretion for the purposes of speedy and substantial justice as contradistinguished from technical forms and delays; and if I felt myself called upon to say whether he had exercised his discretion wisely upon the present objection, I certainly could not say that he had not. But in reality the present case is met decisively by the provisions of the 71st and the 73rd sections of the Summary Convictions Act. The 71st section says distinctly that there is no *certiorari* at all in this case. A previous section had given an appeal; but this section, the 71st, says distinctly that "no conviction or order, or adjudication in appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* into any of Her Majesty's Superior Courts of record." The 73rd section says that where it appears by the conviction that the merits have been tried, (as they have here), and the defendant has not appealed (as in the present case), such conviction shall not afterwards be set aside in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. The point raised here is eminently one of form and form merely. I am not prepared to say whether if I had been sitting in the Court below, I should have ordered an amendment or not; but I am perfectly prepared to say that no *certiorari* lies here unless there has been a clear usurpation of jurisdiction, and even in such a case, the appeal given by the 60th section would probably take away the *certiorari*, though on that I give no opinion; but even if the case were properly before me, I should decline to interfere in a mere matter of form like this, under the restrictions put upon me by section 73. Therefore the petition and writ are dismissed and quashed, and the conviction must remain.

J. R. Gibb, for petitioner.

J. S. Hall, Jr., for respondent.

HOOD V. BARBALOU.

Insolvent—Claim included in List of Liabilities.

The fact that an insolvent has included a claim in his list of liabilities does not prejudice his defence to such claim.

JOHNSON, J. It appears that Barsalou is in insolvency, and the plaintiff's claim is made there, so that it is really only the costs that depend on the judgment now to be given. I do not think that the defendant is liable. The action was on an alleged suretyship; and the defendant pleaded that it was given conditionally, that is, Barsalou only undertook to pay whatever balance might remain in hand after the completion of the work by the men for whom he went security. There is no legal proof of the suretyship alleged. It was urged that the defendant had included the plaintiff's claim in his list of liabilities; but it was done at the request of the assignee, and without any admission of liability.

Action dismissed with costs.

Hutchinson, for plaintiff.

Geoffrion & Co., for defendant.

DIVORCE.

(Continued from page 611.)

Ordinarily divorces are sought upon grounds, or for causes arising after marriage; but there are cases in which the cause may have existed before and at the time of the marriage, as in the case of incurable impotency. Impotency arising from idiocy is no cause for divorce in Vermont. *Norton v. Norton*, 2 Aiken, 188 *Vide Devanbagh v. Devanbagh*, 5 Paige, 550; 6 id. 175; *Newell v. Newell*, 4 id. 25.

Adultery is a good ground for an absolute divorce in all the States of the Union except South Carolina. The statutes of the various States differ in matters of detail, and, therefore, require your examination. There has been an exception to this general rule, where it has been held that adultery committed by an insane wife did not furnish grounds for divorce in Vermont, Massachusetts and Alabama. The contrary was held in Pennsylvania. *Matchin v. Matchin*, 6 Penn. St. (6 Barr.) 332. Divorces have been granted by some of our State legislatures, but it has not been generally practised. And in some cases the State courts have denied the power of the legislature to grant divorces. In many of the State constitutions there are prohibitory clauses against such rights and confer the power upon the courts alone.

The power of the courts to grant *limine* divorces is well settled in this country. Cruel and inhuman treatment and abandonment are frequent grounds of action; there must be either actual violence committed, attended with danger to life, limb or health, or reasonable apprehension of such violence. A single act of cruelty, unless it is a very aggravated one, is not of itself sufficient ground of separation; the acts must be persistent, or reasonable ground for believing that they will be continued. If the husband has offered such indignities to his wife's person as to render her condition intolerable and life burdensome, or if such indignities need not be such as to endanger her life, to cause a good ground for a divorce. In Tennessee it was considered a good ground of a divorce *a mensâ et thoro*, where the husband made gross and unfounded charges of adultery against his wife, and endeavored to criminate her in adultery with a servant. If a husband whip his wife, or threatens or attempts to commit adultery; or if he curses or abuses her, or uses insulting and opprobrious language; or when the husband is in the habit of using vile and abusive language towards his wife, causing her much mental suffering and fits of illness, threatening permanent injury to her health, or making groundless charges of adulterous intercourse against his wife, are grounds of cruel treatment.

Austerity of temper, sallies of passion, abusive language, and mere indignities to the moral character or reputation of his wife, vulgar, obscene or harsh language, with such epithets that deeply wound the feelings and excite the passions, without any menace indicating violence to the person, do not afford sufficient grounds of divorce; nor will a divorce be granted on the ground of extreme cruelty where it appears that the party complaining provoked the violence or misconduct complained of, unless such violence was extremely out of proportion to the provocation. If a wife render her husband's "condition intolerable and his life burdensome," or if her conduct is so violent and outrageous as to render the proper discharge of the duties of married life impossible, it is a good ground of separation from her. Such abuse or indignities offered by the wife to the husband would not justify him in turning her out of doors; he must show

cruel or barbarous treatment or danger of life, as would entitle him to a divorce. Desertion or abandonment by either husband or wife is one ground for divorce; but the desertion or abandonment must be intentional, wilful and malicious, with an intent to breach and disregard the marriage relation. The length of time required to justify a divorce on the above grounds is not uniform in the several States.

Abandonment must be the deliberate act of one party and done with the intent of breaking the conjugal relationship; and where it is mutual and deliberate on both sides no divorce *inculo* will be granted to either party. Where a husband has intentionally and against the consent of his wife, abandoned all matrimonial intercourse and companionship with her and denied her the protection of his home, although at the same time he may have contributed to her support during the time, yet it is a good ground for a divorce.

A wife who, without just and reasonable cause, refuses to accompany her husband, is guilty of desertion; but if the husband persist in taking her to a place where her health may be endangered, or near his relatives where she believes she could not live happily, such desertion would not be considered wilful. To constitute desertion on the part of the wife, she must absent herself from her husband on her own accord, without his consent and against his will.

The refusal of a wife to remove with her husband to a foreign country is not a wilful desertion. A husband is not justified in deserting his wife because she refuses him marital intercourse. Refusal of such intercourse for five years consecutively, although not justified by considerations of health, is not in Massachusetts desertion." Nor is it any ground for desertion or divorce by the wife that her husband's marital intercourse is very frequent, if she has no peculiar debility or physical infirmity, and there is no violence or compulsion on the part of the husband.

If a husband should go away and live apart from his wife, it is not considered a desertion within the meaning of the statutes of New Jersey. It seems to me it would be more equitable and humane that some limit of time

should govern the separation, otherwise the marriage may become a failure and the many attributes arising out of the contract are rendered nugatory. The failure to supply the wife with such necessities and comforts as are within the husband's circumstances and thus by cruelty compelling her to quit him, amounts to actual abandonment and desertion.

In Scotland a divorce may be obtained by the husband or the wife on the ground of adultery or wilful desertion for four years without just cause, after adopting the forms of the act 1873, c. 55, so far as these are required. In Scotland the wife has precisely the same rights as the husband. Such actions are conducted before the Court of Sessions. As a preliminary, the pursuer is required to make oath that the suit is not collusive. The summons must be served upon the defendant personally when he is not a resident in Scotland: but upon evidence satisfactory to the court, that the defendant cannot be found, *edictae* citation will be held sufficient; but in every case of *edictae* citation the summons must be served on the children of the marriage, if any, and one or more of the next of kin of the defendant, exclusive of their children, when the children and next of kin are known and resident within the United Kingdom; and such children and next of kin, whether cited or so resident or not, may appear and state defences to the action. In suit of adultery the husband may cite the alleged adulterer as a co-defendant, and the court may order him to pay the whole or any part of the costs, or may dismiss him from the action, as may seem just. Divorce is barred by condonation, as well as by collusion or connivance. Recrimination cannot be pleaded as a defence to exclude the suit; but it may be stated in a counter action, as the mutual guilt may affect the patrimonial interests of the parties. The legal effect of divorce on the ground of wilful desertion under the act of 1573, c. 55, is that the offending husband is bound to restore the tocher (dowry) and to pay or implement to the wife all her provisos, legal or conventional; and the offending wife forfeits all her terce and all that would have come to her had the marriage been dissolved by the predecease of the husband. After divorce both parties are at liberty to marry again; but the act of 1600, c. 20, annuls any marriage contracted between

the adulterer and the person with whom he or she is declared by the sentence of divorce to have committed the offence.—*From lectures by Isaac Van Winkle.*

CURRENT EVENTS.

IRELAND.

LORD JUSTICE CHRISTIAN'S SUCCESSOR.—Mr. Gerald Fitzgibbon, Q.C., Solicitor General for Ireland, has been appointed Lord Justice of Appeal, in room of Lord Justice Christian, resigned. Mr. Fitzgibbon, who is in his forty-ninth year, took his degree in 1859, was called to the bar in 1860, rose rapidly in his profession, and was made Queen's Counsel in 1872. He is a son of Master Fitzgibbon, who, before his appointment as a Master of Chancery, had enjoyed a very high position at the Irish bar as a lawyer and *Nisi Prius* advocate. The *London Law Journal* says, that the moderation of Lord Justice Fitzgibbon's political views before his removal to the bench and his great legal reputation will render his appointment a most satisfactory one to the public.

CANADA.

THE LINCOLN ELECTION.—The protracted litigation in the Lincoln local election case appears to be drawing to a close. The judgment of the Court of Appeal, on reserved points, given on Monday, Dec. 23, says a daily journal, adds 22 votes to the respondent's previous majority, making it three more than declared by the returning officer three years ago. The votes had all been struck off by the registrar, against whose rulings the appeal was taken. This virtually decides the case in Mr. Rykert's favor, but as he resigned his claim two years ago to the seat, all it does now is to keep Mr. Neelon out. Mr. Hodgins has several appeals to be heard against the registrar's rulings, but at the most these can only amount to half a dozen, and cannot, therefore, reverse the main result. The question of costs will likely take some time to decide, so that it may be a twelvemonth yet before this most remarkable case is finally disposed of. The cost in witnesses' fees, &c., up to the present, is said to amount to \$17,000.

THE LATE MR. JUSTICE DOUCET.—P. A. Doucet, Esq., Judge of the Sessions of the Peace for Quebec, died on Saturday, Dec. 21. The deceased was a son of Pierre Doucet, Esq., merchant, of Quebec. He was born in the city on the 15th of February, 1815, and received his education there. In 1848 he married Marie Thérèse Delphine, daughter of Hon. J. Bruneau, late a Judge of the Superior Court. Mr. Doucet studied law with J. G. Baird, Esq., and the late G. Drolet, Esq. He was called to the bar in 1838, and practised in the city of Quebec until appointed Clerk of the Court of Requests at Lotbinière on the 13th May, 1842. This Court having been abolished on the 27th January, 1842, Mr. Doucet was appointed Clerk of the District Court for the inferior District of Dorchester. He returned to the bar in 1844, and practised in partnership with the late Auguste Soulard, Esq. On the 20th Nov. 1846, he was appointed Joint Clerk of the Peace for the District of Quebec, conjointly with the late F. X. Perrault. After the death of Mr. Perrault, Mr. Doucet was appointed Clerk of the Peace and of the Crown, conjointly with the late James Green, and after Mr. Green's decease, he was, on the 19th May, 1858, appointed sole Clerk of the Peace and of the Crown. On the 19th September, 1868, he was appointed Judge of the Sessions of the Peace. He was *ex-officio* one of the members of the Police Board of the city of Quebec, under the *Vict. cap. 57*. He was created a Knight of the Royal Order of *Isabella Catolica*, 9th Dec. 1872. He was also elected a member of the Royal Academy of Jurisprudence and Legislation of Madrid, 1st June, 1876, and on the 30th June, 1876, a corresponding member of the Academy, with the rank of Professor.

The Paris correspondent of the *Times* gives a list of names circulated in 1848 from the central police-office of Berlin as those of men politically dangerous. Among them are James Fay, subsequently for seventeen years Dictator of Geneva, and in policy a Caesarist; Louis Blanc, now philanthropic member of the Chamber; Herr Bluntschli, Heidelberg professor and devotee of Prince Bismarck's ideas; and Herr Bucher, permanent head of the German foreign office, and Prince Bismarck's best servant.

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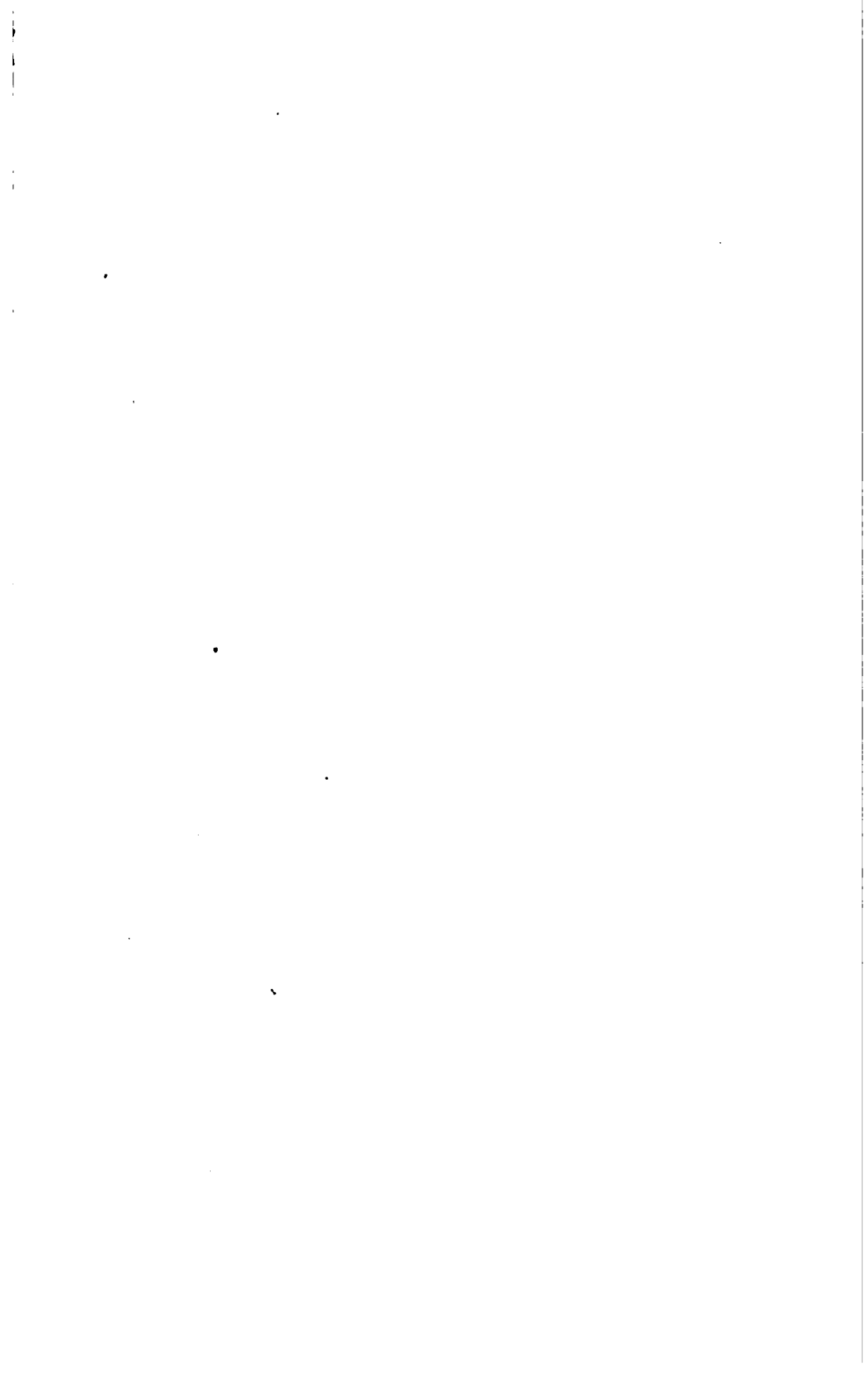
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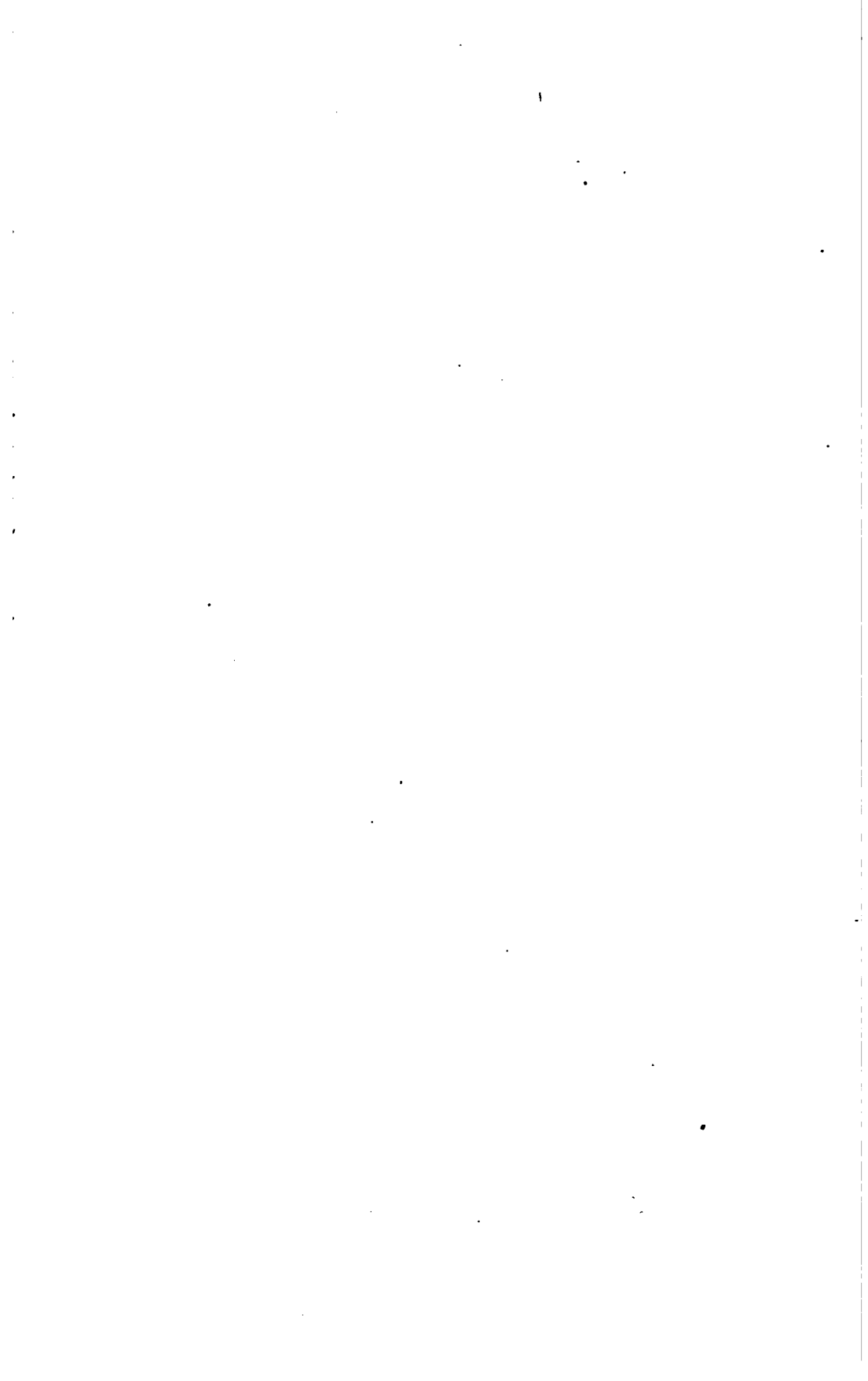
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